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ARTICLES

The Long Lingerin Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*

Robert J. Cottrol[†]

This is an Article on race relations and comparative legal history. It contrasts the law of race and slavery in three Latin American nations, Brazil, Colombia, and Venezuela, with the parallel history in the United States. The Article examines the Afro-Latin experience as a critical issue in its own right and as a way to better inform our discussion of racial hierarchy, identity, and legal remedy in the United States. This Article examines the paradoxical role played by liberal legal and cultural norms in the United States. It shows how liberalism helped create a system of castelike separation between black and white in the United States. This castelike separation was far more rigid than found elsewhere in the hemisphere and was enforced by discriminatory laws. Yet the Article also argues that the very liberalism that helped create strong castelike boundaries in the United States has also helped produce a more thorough North American civil rights revolution than has, to date, occurred in Latin America.

* This Article has been presented at various stages of development in a number of different forums including annual meetings of the Latin American Studies Association, the Legal History Section of the Association of American Law Schools (AALS), the American Society for Legal History, the American Sociological Association, and the Northeastern People of Color Regional Conference. This Article also profited from discussion at a faculty workshop at the George Washington University School of Law. The author would like to acknowledge helpful comments made by Cynthia Lee, Naomi Cahn, Richard Cummins, Raymond T. Diamond, Paul Finkelman, Tanya Hernandez, and Hector Garcia Santayana. Research for this Article was done during my sabbatical during the fall of 2000. I would like to thank George Washington University for the time off to think, reflect, and research on these issues. My understanding of issues of race and status in Brazilian society greatly benefited from a trip to Brazil in July of 2001. A special thanks to Michael Young for underwriting part of the expense of the trip. During that trip I had occasion to meet with Afro-Brazilian civil rights activists at the U.S. Consulates in Rio de Janeiro and São Paulo. The opportunity to exchange ideas with them was simply invaluable and to those who participated in those sessions, I would like to sincerely say, *muito obrigado*. Thanks also to Bainbridge Cowell, Jr., Marshall Louis, and Chantal Dalton of the U.S. Foreign Service for arranging those sessions. *Obrigado* also to Deborah Batista of the consulate staff in São Paulo. A special *muito obrigado* to Kcila Grinberg for sharing a copy of her doctoral *tese* in history and to Joaze Bernardino for sharing a copy of his master's *dissertação* in sociology. I also wish to acknowledge the helpful research assistance of Kamala Miller, George Washington University Law School, Class of 2002. As always, Scott Pagel, Iris Green, and the law library staff at George Washington provided superb bibliographic support. Unless otherwise indicated, all translations are my own.

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I.	INTRODUCTION	12
II.	THE ENDURING SIGNIFICANCE OF RACE.....	17
III.	AFRO-AMERICANS: A HEMISPHERIC PERSPECTIVE.....	25
	A. <i>Historical Overview</i>	25
	B. <i>Race and Contemporary Afro-Latins: The Elusive Problem</i>	35
IV.	SLAVERY, FREEDOM, AND THE LAW—DIFFERING AMERICAN EXPERIENCES.....	40
	A. <i>The United States</i>	44
	B. <i>Brazil</i>	52
	C. <i>Spanish America</i>	58
V.	FROM EMANCIPATION TO EQUALITY, THE UNFINISHED JOURNEY	61
VI.	CONCLUSION.....	79

I. INTRODUCTION

This Article seeks to broaden our current conversation on law and race. The contemporary discussion on law and race, or perhaps more accurately law, race, and remedy has tended to examine the U.S. experience in a vacuum. This is perhaps to be expected. Certainly legislators and members of the bench and bar, of necessity, must keep their attentions focused on immediate cases and parties or on current legislative initiatives. The immediacy of their concerns usually leaves little time for broad comparative inquiries. More surprisingly, the relatively narrow focus of legislators and litigators has often been shared by legal scholars and historians as well as social scientists concerned with the law. Contemporary legal scholars have paid relatively little attention to the possibility of comparative examination of race and legal systems. There is relatively little comparative literature examining either the role of law as it applies to racial status and racial differentiation in developing systems,¹ or contrasting

1. The relatively narrow focus of contemporary legal scholars in this regard might be contrasted with the broad comparative work essayed by sociologist Frank Tannenbaum in the 1940s in *FRANK TANNENBAUM, SLAVE AND CITIZEN: THE NEGRO IN THE AMERICAS* (1946). The Tannenbaum thesis, its strengths, weaknesses, and usefulness as a model for contemporary comparative endeavor will be discussed at greater length in this Article. See *infra* notes 131-150 and accompanying text. For two contemporary legal scholars who have used a comparative focus to illuminate discussions of race and law, see Tanya K. Hernandez, *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 33 U.C. DAVIS L. REV. 1135 (2000), and Alfreda A. Sellers Diamond, *Constitutional Comparisons and Converging Histories: Historical Developments in Equal Educational*

contemporary American strategies and debates concerning racial discrimination and legal remedy with parallel efforts in other societies.

This Article is concerned with how our understanding of law and race in the United States might be improved or clarified through comparative study, in this case the study of race in Latin America. Specific examples will be drawn from the history of Brazil and from the histories of Colombia and Venezuela as representative of the Afro-American experiences in the Spanish-speaking nations of the Western Hemisphere.² This study will focus on comparative Afro-American³ experiences and how the legal histories of four American nations have helped shape their national racial cultures.⁴

Opportunity Under the Fourteenth Amendment of the United States Constitution and the New South African Constitution, 26 HASTINGS CONST. L.Q. 853 (1999).

2. I am sensitive to the fact that the histories of the different Spanish-speaking societies of the hemisphere are quite distinct and that Colombia and Venezuela cannot simply serve as a stand in for other nations. See *infra* Part II. Still I think both nations can help in our discussions of the law of slavery in the colonial period, the connection between the liberal revolutions for independence and emancipation, and the paradox of the ideology of racial democracy combined with the often marginal status of Afro-Americans in many Latin American nations.

3. Throughout this Article the term Afro-American will be used in place of the currently more popular African American. This is in part conforming to what tends to be prevailing usage among Latin Americanists, particularly those from outside of the United States. Also it seems to be a more accurate term especially when used in a hemispheric context. If we look at peoples of African descent in the Americas we will find a very broad range of retention or loss of African cultures. We will also find very broad ranges of phenotypes from people who are very African in their appearance to people whose African ancestry is not readily identifiable except in cases of self-identification. See *infra* note 114 and accompanying text. For these reasons, the term Afro-American seems more appropriate.

4. It should be noted that while this Article focuses on Afro-American issues there is much important work to be done for those interested in contrasting racial and ethnic groups in Latin America with those in the United States. For those with an interest in American Indian populations and the area of Indian law and indigenous rights, Latin America is a particularly fruitful area for exploration. Every country in the hemisphere has significant Indian or indigenous populations, including visibly mestizo populations. Those who have concentrated their research on Asian-American populations would also find much to explore and contrast through an examination of different Latin American societies. Brazil's São Paulo for example has the largest ethnic Japanese population in the world outside of Japan. For further study of the Japanese population in Brazil, see TOMOO HANDA, *O IMIGRANTE JAPONÊS: HISTÓRIA DE SUA VIDA NO BRASIL* (T.A. Queiroz ed., 1987); HIROSHI SAITO, *O JAPONÊS NO BRASIL: ESTUDO DE MOBILIDADE E FIXAÇÃO* (1961); and FRANCISCA ISABEL SCHURIG VIEIRA, *O JAPONÊS NA FRENTE DE EXPANSÃO PAULISTA: O PROCESSO DE ABSORÇÃO DO JAPONÊS EM MARÍLIA* (1973). There are also significant ethnic Japanese populations in Argentina and Peru. The Japanese-Peruvian population has been highlighted in recent years because the parents of the former President of Peru, Alberto Fujimori, were Japanese immigrants. Peru was noted for its particularly harsh treatment of its ethnic Japanese and Japanese immigrant population during the Second World War.

Significant ethnic Chinese populations are to be found in Central America and Cuba among other places. Brazil and Argentina, among other nations, also provide interesting opportunities for those with research interests in European immigration and the acculturation

Brazil was an inevitable choice for this study. Its experience with slavery was the longest in the Western Hemisphere. It received more Africans than any other society in the hemisphere.⁵ Today Brazil has the largest population of people of African descent of any nation in the world with the exception of Nigeria.⁶ Afro-Brazilians have long been recognized as a critical part of that nation's population. There is a vast body of historical and social science literature on race relations in Brazil. Brazil today is also a nation with an extensive body of antidiscrimination legislation treating issues that would be reasonably familiar to North American students of the subject.

Colombia and Venezuela were selected because of their large Afro-American populations and their important histories of slavery, emancipation, and postemancipation race relations. It should be noted that the historical and social science literature treating race relations and Afro-American populations is much less developed in Colombia and Venezuela than in Brazil or the United States. This follows the general pattern in the Spanish-speaking nations of the hemisphere, where it is fair to say that the study of Afro-Americans in postemancipation society is still in its infancy. Neither nation has as well-developed a body of civil rights law as Brazil, although Colombia has within the last decade taken special measures to insure a minimum level of representation for Afro-Colombians and other minorities in their national Congress. Colombia has also taken special measures to protect Afro-Colombian landholdings.⁷ Although Venezuela's legal response to the issue of racial discrimination is somewhat less well-developed than those of Brazil and Colombia, that nation provides an excellent social setting for the study of the Latin American idea of racial democracy. My focus on these nations is the start of what I hope will be a broader study that will examine race and law in the other nations of the hemisphere as well.

In this Article I intend to explore the role of legal doctrine and legal institutions in developing the often differing racial cultures of the

and assimilation of the descendants of European immigrants. Argentina, for example, has a large population descended from Italian immigrants. Brazil has large populations descended from Italian immigrants (particularly in the states of Rio Grande do Sul, Santa Catarina and São Paulo), German immigrants (Rio Grande do Sul and Santa Catarina), and Polish and Ukrainian immigrants (Paraná).

5. See *infra* note 59 and accompanying text.

6. Sebastian Rotella, *In Brazil, a Threat to Fusion of Religions*, L.A. TIMES, Aug. 8, 1998, at A18.

7. CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 176; see *infra* notes 341-342 and accompanying text.

four American nations. The law of slavery played an important role in what today is commonly called the social construction of race. The cultural metamorphoses that transformed the descendants of differing African peoples into the Afro-American populations of the Americas was greatly aided by the legal categorizations developed during slavery. Similarly, laws which had their origins in slavery played a key role in transforming diverse European groups into whites and in policing the boundaries between whites and others. The law of slavery played a key role in the formation of group identity as well as group privilege and disadvantage. It would do so in ways that would structure race relations and the struggle for equal rights well after emancipation and, indeed, into our twenty-first century.

Comparative examinations can highlight differences. In fact, there is often a danger that they will exaggerate or magnify differences. There have been many shared experiences on the part of Africans and their Afro-American descendants throughout the hemisphere. But there have also been important differences. One of the more important of these differences has had to do with law and the underlying liberal ideology that informed the law in the United States. American law, unlike the law in Brazil, Colombia, and the other slave societies of the western hemisphere, had the cognitively difficult task of reconciling first race-based slavery and later race-based hierarchy with a strongly liberal national ideology and a normatively antihierarchical national culture. This was an unique, intellectually difficult, and indeed impossible task. While slavery had existed in many societies, indeed in most human societies until the nineteenth century,⁸ the United States was unique as a society which strongly embraced liberal ideology⁹ at a time when slavery's importance was increasing.¹⁰ The law of slavery had to resolve two conflicting,

8. For the most comprehensive examination of slavery in comparative perspective examining the institution from the ancient world to modern times, see ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982).

9. Brazilian legal historian Eunice Aparecida de Jesus Prudente (Eunice Prudente) makes the point that liberal ideas were having some influence in nineteenth-century Brazil while that society was maintaining slavery. See EUNICE APARECIDA DE JESUS PRUDENTE, *PRECONCEITO RACIAL E IGUALDADE JURÍDICA NO BRASIL* 16, 29-31, 55 (1989). It should be noted that the Brazilian liberalism, particularly in the early nineteenth century, was quite limited and met its strongest expression as a basis for opposing the restrictive mercantile policies of the Portuguese Crown. See *id.* at 29-31. Brazil became independent in 1822 and was under the rule of Emperor Dom Pedro I, whose rule was quite autocratic. See *id.* at 54-55. For more on nineteenth-century Brazilian liberalism and slavery, see *infra* notes 228-235 and accompanying text.

10. Robert J. Cottrol, *Liberalism and Paternalism: Ideology, Economic Interest and the Business Law of Slavery*, 31 AM. J. LEGAL HIST. 359, 364-65 (1987).

irreconcilable demands: the South's critical slave economy and the nation's strong liberal ideology and culture. The law had to engage in a kind of cognitive dissonance that was not found in any other slave society. Out of this dissonance would come a racial rigidity unmatched elsewhere in the hemisphere. U.S. law created a far more rigid regime of racially based status—a caste system if you will—than existed in Latin America. But this history has a paradox. Law in the United States has, so far, proved to be a far more successful tool in dismantling patterns of racial discrimination and race-based status and hierarchy than has been the case in Latin America. Ironically, the historical rigidity of racial status in the United States as well as the liberal and antihierarchical culture that helped create that rigidity, has allowed the law to play a greater role in attacking racial discrimination. It is this paradox that is central to this Article.

This Article is divided into four parts. Part II, entitled "The Enduring Significance of Race," briefly reviews current debates in U.S. society over the extent to which law should recognize race or take race into account in such areas as remedial efforts, racial definition, and criminal justice. Part III is called "Afro-Americans, A Hemispheric Perspective," and provides the reader with an introduction to the issues of race and Afro-American populations in Latin America, as well as a comparison of racial stratification in the United States and Latin America. Part IV is named "Slavery, Freedom, and the Law: Differing American Experiences." This Part examines the role of the law of slavery in developing and sustaining differing patterns of race relations in the Americas. The role of law in perpetuating and challenging racial hierarchy in the United States, Brazil, Colombia,

11. The use of the term "caste" to describe black—white relations for a good portion of American history is both highly useful and highly problematic. Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255 (1983). It is useful in that it captures the high degree of separation, even ritualistic separation, that was often imposed. The petty apartheid of the Jim Crow era with its separate drinking fountains, park benches, and the like, are an example of this. *Id.* at 264-65. On the other hand the term "caste" is problematic. The term has been borrowed from traditional social distinctions found in Indian society and rooted in the Hindu religion. *Id.* at 255. While it might be presumed that, at least traditionally, Hindus across caste lines accepted the notion of caste distinctions because it was part of their religious world view, that was not the case with respect to castelike distinctions imposed on blacks in the United States. *Id.* To a very large extent the history of free Afro-Americans in the United States has been the history of struggles against castelike distinctions. It should also be added that considerable numbers of white North Americans, in part because of the liberal ideology of the nation, have also rejected the imposition of castelike distinctions on blacks. *Id.*

and Venezuela after emancipation is examined in Part V, entitled "From Emancipation to Equality, the Unfinished Journey."

II. THE ENDURING SIGNIFICANCE OF RACE

At the beginning of the last century, social critic and civil rights pioneer W.E.B. DuBois could state with confidence that the problem of the twentieth century would be "the color line."¹² The evidence supporting DuBois' statement was undeniable, and if you were black in the United States, inescapable. The color line was everywhere. In the South, still home to nearly ninety percent of the nation's black population in 1900,¹³ separate, castelike treatment was mandated by law. State statutes, municipal ordinances, and the dictates of public officials prescribed separate schools,¹⁴ separate railway coaches,¹⁵ different bibles for black and white witnesses in judicial proceedings,¹⁶ and even separate cemeteries or sections of cemeteries for colored and

12. W.E. BURGHARDT DUBOIS, *THE SOULS OF BLACK FOLK* 13 (12th ed. 1920).

13. The census of 1900 indicated a combined male and female colored population of 8,932,875 for the United States as a whole. See ICPSR, *Census Data for the Year 1900*, at <http://fisher.lib.virginia.edu/cgi-local/censusbin/census/cen.pl?year=900> (last modified Mar. 24, 1998). The total population listed as colored in the southern states counted was 7,912,439. *Id.* For these purposes I defined a state as southern if it had slavery in 1860. By that definition I counted the following states as southern: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas, and Virginia. I did not count West Virginia which was part of Virginia in 1860. It should be noted that the 1900 census had enumerations for both the Negro and colored populations. *Id.* The Negro population was a subset of the colored population, the latter category included blacks (listed as Negroes) and mulattos or persons of mixed race. *Id.* It is interesting to note in light of the discussions below on racial classification that ninety-seven percent of the Afro-American population in 1900 was listed as Negro or black. *Id.* The Negro population was listed at 8,688,150 persons. That was out of a total colored population of 8,932,875. If these figures are to be taken at face value, we would assume that only three percent of the Afro-American population was mulatto or mixed. Obviously the mixed race population far exceeded that percentage. The best explanation for the low percentage of mulattos is that being mulatto or of mixed racial background had no legal significance and little social or cultural significance to whites, therefore census officials had little interest in making distinctions between blacks and mulattos. This is in sharp contrast to the prevailing view in Latin America where the two groups are seen as quite distinct.

14. See, e.g., *Mullins v. Belcher*, 134 S.W. 1151, 1151-52 (Ky. 1911) (defining "colored children" in Section 187 of the Kentucky Constitution to include "all children wholly or in part of negro blood" to enforce school segregation).

15. See, e.g., 1890 La. Acts 111 (providing that "all railway companies carrying passengers in [Louisiana], shall provide equal but separate accommodations for the white, and colored races").

16. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 97-100 (2d rev. ed. 1966).

white burials.¹⁷ Few aspects of human existence were too important or too trivial to escape the ingenious and energetic architect of U.S. petty apartheid, Jim Crow.

Nor was the color line simply a matter of separations silly and serious. Whether the law would protect your life, your family, or your property, to a very real extent depended on your race.¹⁸ Whether you could vote for the county sheriff who was supposed to protect you, the judge who was supposed to hear your case in court, the legislator who was supposed to represent you, or even the registrar of voters who was supposed to determine whether you were qualified to vote, all depended on which side of the color line you stood.

This system was by no means confined to the South. Jim Crow statutes were certainly found outside of the eleven states that constituted the former Confederacy.¹⁹ The most common of these were statutes forbidding interracial marriages.²⁰ These were found in a majority of states in 1900 when DuBois made his prediction. The federal government did more than simply tolerate the system of Jim Crow; it adopted it. Segregation would remain the rule in the U.S. armed forces through the first half of the twentieth century and through two world wars.²¹ The federal civil service would be segregated in many places both in terms of employment opportunities and in terms of the physical facilities available to government workers.²² All of this would be done with the imprimatur of Congresses, Presidents, and even the highest tribunal in the land—the Supreme Court.²³

In this world, the United States of the first half—indeed more than the first half—of the twentieth century, the role of law in maintaining the nation's systemic racial hierarchy was unambiguous.

17. See *Richmond Cemetery Co. v. Walker*, 97 S.W. 34, 34-35 (Ky. 1906) (holding that municipal officials could not maintain segregated cemeteries because their actions were not sanctioned by statute and hence *ultra vires*).

18. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 349-58 (1991) (describing violent behavior exhibited against blacks).

19. It should be remembered that the landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954), was argued against the Board of Education of Topeka, Kansas. See *infra* note 27 and accompanying text.

20. DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 67-68 (3d ed. 1992).

21. JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 291-309, 385-410 (6th ed. 1988). For a good general history of Afro-Americans in the United States Armed Forces, see BERNARD C. NALTY, *STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY* (1986).

22. See FRANKLIN & MOSS, *supra* note 21, at 292.

23. See *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896).

The law sanctioned a clear system of white supremacy and black subordination, notwithstanding the imperatives of the Civil War Amendments.²⁴ Legislation and court decisions even took meticulous efforts to define who was white and who was black in order to make clear who would be privileged or disabled.²⁵ The U.S. rule was simple. If you had traceable African ancestry you were a Negro, with all the disadvantage and stigma that that term implied.²⁶

We can fast-forward to the present. We will skip over many of the landmarks of the history of race in the United States in the twentieth century: disenfranchisement, the Niagra movement and the NAACP, the segregationist policies of Woodrow Wilson, the French Army's awarding of the Croix de Guerre to the 369th regiment from Harlem in 1918, the lynching of colored dough boys returning from the "War to End All Wars" in 1919, the Great Migration, the Harlem Renaissance, the New Negro, segregated Civilian Conservation Corps Camps during the Great Depression, the "Scottsboro Boys," the internment of Japanese Americans, the Negro engineers and tankers in a segregated army who helped liberate Dachau and Buchenwald, Jackie Robinson, the desegregation of the armed forces, *Brown v. Board of Education*,²⁷ Rosa Parks, Emmett Till, the Civil Rights Act of 1964, the Voting Rights Act of 1965, Martin Luther King's Assassination, Thurgood Marshall's service on the Supreme Court, Black Power, the Black Panthers, the Southern Strategy, *Defunis v. Odegaard*,²⁸ *Regents of the University of California v. Bakke*,²⁹ the growth of the underclass, and Colin Powell's service as Chairman of the Joint Chiefs of Staff. We will skip over these and other familiar and less familiar landmarks and come to the present. What is the significance of race or color in the United States today, and does the law, or should the law, have any role in recognizing race and making racial distinctions amongst the peoples of America?

This question is far more subtle and complex than the one DuBois faced. The colored and white signs have come down. The last vestiges of Jim Crow law were eradicated by statute and court decision

24. See U.S. CONST. amends. XIII-XV.

25. See, e.g., 1976 La. Acts 352 (requiring explicit detail of race on birth certificates); *Mullins v. Belcher*, 134 S.W. 1151, 1152 (Ky. 1911) (setting standard to qualify legally as black).

26. See, e.g., *Diamond & Cottrol*, *supra* note 11, at 258-60.

27. 347 U.S. 483 (1954).

28. 416 U.S. 312 (1974).

29. 438 U.S. 265 (1978).

more than a generation ago.³⁰ Black men and women are found in places that would have been inconceivable, not only to the young DuBois who foretold the twentieth-century color line in 1900, but to the elderly DuBois who died in 1963 as well. Black students are routinely enrolled in previously all-white—indeed previously legally segregated—universities. The same may be said for black faculty members although their presence is still fairly rare in most academic disciplines.³¹ Black officers, even flag rank officers, have long since ceased to be a rarity in the racially integrated armed forces. Black men and women are to be found in major law firms and the executive offices of major corporations—not in numbers that correspond to the black portion of the population at large, and not in the highest of legal and managerial positions to be sure—but present, and present in sufficient numbers so that the black man or woman in such a position cannot be dismissed as freakish or idiosyncratic. Black politicians are routinely found in state legislatures and the United States House of Representatives. The occasional black governor or senator even serves a term or two, every now and then. Black cabinet members routinely advise presidents of both parties. The son of black West Indian immigrants now serves as Secretary of State. This is a far cry from the world the young DuBois knew. When he first wrote about the approaching color line of the twentieth century, there was a major political firestorm simply because Theodore Roosevelt dined with Booker T. Washington in the White House.³²

And it is not just in the upper-middle-class world of universities, law firms, the officer corps, or public office where the formal color bar that figured so prominently in the lives of Afro-Americans little more than a generation ago has been replaced. It is easy to forget how pervasive discrimination once was. Every black man driving a bus, every black woman working as a convenience store clerk, every black man or woman wearing the uniform of a navy petty officer, every black bricklayer or firefighter, police officer or house painter, hotel clerk or telephone operator, represents hard-won victories—victories

30. WOODWARD, *supra* note 16, at 149-88.

31. One of the reasons for the scarcity of blacks in higher education is the relatively small number of blacks who receive Ph.D.s. Less than four percent of Ph.D.s received by U.S. citizens currently go to Afro-Americans. See PAULA RIES & DELORES H. THURGOOD, NAT'L RESEARCH COUNCIL, SUMMARY REPORT 1992: DOCTORATE RECIPIENTS FROM UNITED STATES UNIVERSITIES 5 (1993).

32. LOUIS R. HARLAN, BOOKER T. WASHINGTON: THE MAKING OF A BLACK LEADER 1856-1901, at 304-24 (1972).

over policies official and unofficial that once barred many black people from working in occupations great and small.

But those victories have been won and the new realities help highlight the question of what notice the law should take of race. There is, to be sure, something of a consensus that the law should prohibit the kind of racial discrimination that prevailed in most of the nation until quite recently. Statutes prohibiting racial discrimination in public accommodations, employment, or the housing market are by now reasonably uncontroversial;³³ although it should also be remembered that these measures met with stiff resistance when first proposed. But should the law do more? Can it? The development and enforcement of egalitarian legal norms over the last generation and a half has helped to lessen, but has by no means erased, often profound differences between the experiences and circumstances of blacks and whites in the United States. Striking differences can often be found in such readily quantifiable social indicators as family structure,³⁴ income,³⁵ homicide rates,³⁶ performance on standardized tests,³⁷ occupational structure,³⁸ and residential segregation,³⁹ among others. Many social scientists have also attempted to grapple with the often elusive issue of cultural differences and the extent to which those differences have contributed, and continue to contribute, to the often

33. For one prominent legal scholar's argument against antidiscrimination laws in the workplace, see RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

34. See ORLANDO PATTERSON, *RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES 46-48* (1998).

35. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 110-11* (1987).

36. See Robert J. Cottrol, *Hard Choices and Shifted Burdens: American Crime and American Justice at the End of the Century*, 65 GEO. WASH. L. REV. 506, 517-18 (1997) (book review) (reviewing MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA* (1995)).

37. Differences in standardized test scores have been of particular interest in recent years to those whose writings have suggested a sympathy for a revival of scientific and pseudoscientific theories of inherent racial difference. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

38. See generally Robert L. Kaufman, *The Impact of Industrial and Occupational Structure on Black-White Employment Allocation*, 51 AM. SOC. REV. 310 (1986) (comparing the effects of the neoclassical and dual economy approach to studying Black-White employment allocation); Ted Mouw, *Job Relocation and the Racial Gap in Unemployment in Detroit and Chicago, 1980 to 1990*, 65 AM. SOC. REV. 730 (2000) (showing a correlation between the rise of the minority unemployment rate and job decentralization).

39. See PATTERSON, *supra* note 34, at 155-56.

strikingly different social and economic patterns that separate black and white despite the presumption of equality before the law.⁴⁰

There is debate over whether black and white differences should be looked at as part of the legacy of slavery, or whether those differences owe more to developments in postemancipation America.⁴¹ That debate is considerably less heated than the debate over whether or not the law should recognize and attempt to ameliorate differences and inequalities of condition through the specific recognition of race. Certainly that is at the heart of the affirmative action controversy. The familiar debate pits those who champion presumably race-neutral measures in selecting university students, government employees, or contractors against those who argue that such measures can often mask profound inequalities of result and the unlevel playing fields on which black and white competitors often find themselves.⁴² This is an area where advocates of allowing the law to take race into account have been steadily losing ground over the last two decades in court decisions⁴³ and popular referenda.⁴⁴ Some, particularly in the field of university admissions, have been searching for proxies for race that might protect the gains in student body diversity that have been achieved in recent decades without explicitly using race as a criterion.⁴⁵

Although the affirmative action debate provides the most visible controversy over whether the law can recognize race, it is by no means the only such controversy. The issue has been woven into the fabric of contemporary U.S. law. Those who work in the fields of substantive or

40. For a recent work by one of the more important students of contemporary inner-city Afro-American culture, sociologist and urban ethnographer Elijah Anderson, see ELIJAH ANDERSON, *CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY* (1999).

41. See PATTERSON, *supra* note 34, at 44-50.

42. See, e.g., Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1327-37 (1986).

43. See, e.g., *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 235-37 (1995) (holding affirmative action must be narrowly tailored to serve a compelling government interest); *Podberesky v. Kirwan*, 38 F.3d 147, 161 (4th Cir. 1994) (challenging scholarship program only open to African American students); *Hopwood v. Texas*, 999 F. Supp. 872, 879 (W.D. Tex. 1998), *aff'd in part, rev'd in part*, 236 F.3d 256 (5th Cir. 2000) (holding nonminority applicants had no reasonable chance for admission under a system without racial preferences).

44. See, e.g., CAL. CONST. art. I, § 31 (adopted by voters, Prop. 209, effective Nov. 6, 1996) (banning discrimination and preferential treatment on the basis of race); WASH. REV. CODE ANN. § 49.60.400 (West Supp. 2001) (Initiative Measure No. 200, approved Nov. 3, 1998) (prohibiting affirmative action as well as discrimination based on race).

45. Some, for example, have suggested class-based affirmative action as an alternative. See, e.g., Richard Kahlenberg, *Class, Not Race*, THE NEW REPUBLIC, Apr. 3, 1995, at 21.

procedural criminal law are concerned with issues of racial profiling,⁴⁶ disparate sentencing,⁴⁷ jury composition and behavior,⁴⁸ among other issues. Specialists in family law have certainly puzzled over the issue of cross-racial adoption.⁴⁹ Should a child, usually black, be placed in the home of prospective white parents and siblings? Do the benefits of a loving and stable home outweigh the putative disadvantages of being raised by parents presumed to be unfamiliar with Afro-American culture and the burdens of race in America? The issue of race, race consciousness, and the law is certainly of concern to attorneys who work in the area of voting rights and who are concerned with the issue of whether redistricting or gerrymandering can dilute the impact of black votes.⁵⁰

Even the census has gotten into the controversy over law and race consciousness. The year 2000 census allowed individuals to indicate more than one racial category.⁵¹ There had been a debate over whether or not to include a multiracial category in the census.⁵² The category generated considerable controversy, particularly among blacks who felt the development of the category would weaken the traditional identification of all persons with any acknowledged African ancestry as part of the Afro-American population.⁵³

46. See, e.g., Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431-32 (1997) (citing empirical and anecdotal evidence that race is frequently the defining factor in pretextual traffic stops); David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 560-73 (1997) (demonstrating that the police use traffic violations as a pretext to stop Afro-American and Hispanic drivers for drug investigations); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 957-59 (1999) (citing empirical evidence of the profiling of Afro-American drivers by the New Jersey State Police and the targeting of blacks and Hispanics for stops and frisks by the New York City Police Department's Street Crimes Unit).

47. See Pamela G. Alexander, *Inequality in Sentencing: Is Race a Factor in the Criminal Justice System?*, 17 LAW & INEQ. 233, 233-35 (1999).

48. See Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1262, 1262-64 (2000).

49. See, e.g., Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991) (detailing cultural and legal implications of cross-racial adoption).

50. See generally ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1987) (noting the struggle for equal voting rights for blacks in the South); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173 (1989) (analyzing the courts' use of racial geographic segregation).

51. Tanya Kateri Hernández, "Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97, 100-15, 157 (1998).

52. *Id.* at 157.

53. See *id.* at 171-72.

The debates over law and race consciousness go back and forth, with individuals sometimes shifting sides depending on the issue. Thus there are critics of affirmative action, boldly proclaiming their allegiance to Justice Harlan's notion of a color-blind society,⁵⁴ who nonetheless find using race as an acceptable tool for locating potential criminal suspects.⁵⁵ There are prospective parents who wish to adopt a child of another race and feel that race should not be an issue in adoption, who nonetheless might see merit in taking race into account when deciding university admissions. Some are more sympathetic to the use of race as a factor in university admissions. Others are more sympathetic to minority set-asides for government contractors. Consistency has not necessarily been a hallmark of our modern debates over law and race.

If the partisans in these debates have had their inconsistencies and shifting allegiances, it should nonetheless be noted that there are some remarkable areas of, at least public, agreement on both sides of the law and race consciousness divide. First, there is a consensus, the census debate notwithstanding, that black and white are reasonably discreet and recognizable categories. Few North Americans would take the view that the categories might be arguably ambiguous and contextually determined. This is a view that can only be understood or explained with reference to the legal history of the United States, particularly by looking at that legal history in a comparative framework.

54. Justice John Harlan in his dissent in *Plessy v. Ferguson* famously proclaimed the view that the Fourteenth Amendment could not tolerate the law's recognizing racial distinctions:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

163 U.S. 537, 559 (1896).

55. See, e.g., Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787 (1994) (exploring the legal implications when criminal defendants claiming self-defense rely on race to explain their behavior).

Another remarkable feature of the debate is that partisans on both sides adhere, at least at the rhetorical level, to a certain set of egalitarian and liberal norms. This has certainly been seen in the affirmative action debates where both opponents and supporters of race conscious remedies have argued that their policies represent the best hope of reaching the long range goal of an egalitarian society with color-blind equality before the law.⁵⁶ Both sides argue that theirs is the path to reconciling the constitutional demands for equal protection under the law with the need to provide a fair means of social and status mobility for those who have been underrepresented or excluded in the past.⁵⁷ For a high stakes debate that is often conducted with more than a little rancor, there is a remarkable and often overlooked consensus on basic premises regarding the eradication of traditional barriers and the desirability of leaving open possibilities for mobility and inclusion.⁵⁸ That the U.S. debate is characterized by a formal acceptance of certain liberal and egalitarian norms, and indeed by the internalization of those norms by a broad segment of the public including the legal profession, is hard to see when only looking at the experience in the United States. Again that consensus stands out in much sharper relief when viewed in comparative perspective.

III. AFRO-AMERICANS: A HEMISPHERIC PERSPECTIVE

A. *Historical Overview*

The black experience in the United States is actually a fairly small part of a much larger history of the forced transportation and settlement of Africans in the New World and the histories of their Afro-American and non-Afro-American descendants. Our best information indicates that less than six percent of Africans brought to the Americas settled in what became the United States.⁵⁹ The experiences of Portugal, Spain, and later Latin America with African and Afro-American slavery were of a far longer duration than that of British North America, later the United States. African slavery would begin in metropolitan Spain and Portugal early in the fifteenth century before Columbus's voyage to the New World.⁶⁰ Latin American slavery would

56. See, e.g., *California and Affirmative Action: Hearing Before the Sen. Comm. on the Judiciary*, 104th Cong. 4-37 (1997) (testimony of Pete Wilson, Governor of California and Ward Connerly, Regent, University of California).

57. *Id.*

58. *Id.*

59. HERBERT S. KLEIN, *THE ATLANTIC SLAVE TRADE* 210-11 (1999).

60. See PHILIP D. CURTIN, *THE ATLANTIC SLAVE TRADE: A CENSUS 17-18* (1969).

formally end nearly five hundred years later in Brazil in 1888, a generation after Appomattox and the passage of the Thirteenth Amendment.⁶¹ Over four million African captives were brought to Brazil alone.⁶² The giant Lusophonic colony and nation received the largest number of Africans from the transatlantic slave trade, more than seven times the 560,000 Africans that are estimated to have come to what would become the United States.⁶³ The Spanish-speaking regions of the Western Hemisphere received 1,662,400 African captives.⁶⁴ The sugar plantation economies of the Americas were the biggest magnet for the African slave trade. Northeastern Brazil and the Caribbean received the largest number of Africans brought during the nearly four centuries of the transatlantic slave trade, and the British and French Caribbean colonies combined received more than three million Africans.⁶⁵ The pull of the sugar plantation economy was so strong that Cuba is estimated to have imported over 780,000 African slaves between 1790 and 1867 alone, nearly 140% of the total number of Africans brought to the United States between the seventeenth century and the end of the Civil War.⁶⁶

Africans, it should be stressed, were brought to every New World society and were a visible and significant portion of the population in colonial times. This was the case even in countries that today have relatively small or invisible Afro-American populations. Thus blacks were very visible in Buenos Aires and other parts of Argentina during the colonial era and throughout the nineteenth century. In the twentieth century, the Afro-Argentine population has been so small, at least in relative numbers, that most observers, including most Argentines, claim that the population is nonexistent.⁶⁷ Chile had

61. GILBERTA FREYRE, *THE MANSIONS AND THE SHANTIES: THE MAKING OF MODERN BRAZIL*, at xxxvii (Harriet de Onís ed. and trans., 1963).

62. See KLEIN, *supra* note 59, at 210-11. The four million Africans brought to Brazil counted for forty percent of the estimated 10,072,500 Africans brought to the Americas. See *id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. LAIRD W. BERGAD ET AL., *THE CUBAN SLAVE MARKET 1790-1880*, at 38 (1995).

67. The question of the so-called "disappearance" of the Afro-Argentines is an issue that has long fascinated students of Argentine history. It is a question that also touches on many of the themes of this Article. In the late 1940s, Argentine demographer Ángel Rosenblat estimated that Argentina included 5000 blacks and 10,000 mulattos (defined by Rosenblat as those with one-fourth or more black ancestry) as part of its then existing population of seventeen million people. See 1 ANGEL ROSENBLAT, *LA POBLACION INDIGENA Y EL MASTIZAJE EN AMERICA* 20-21, 169-70 (1954). Rosenblat, writing in the early 1950s, conceded that his estimates for Afro-Argentines were hypothetically based on an 1895 census

that listed race. *Id.* at 169-70. At least one North American expert on Argentine history contended that these figures were probably an overestimate. See JAMES R. SCOBIE, *ARGENTINA: A CITY AND A NATION* 32-33 (2d ed. 1971).

What is interesting is that Afro-Argentines were a very visible presence in Buenos Aires and other parts of Argentina in the nineteenth century and have been all but invisible in the twentieth. If we take for example Rosenblat's figures (which in my view are probably an underestimate) of 15,000 Afro-Argentines in an overall Argentine population of seventeen million, then in the late 1940s and early 1950s, Afro-Argentines would have constituted roughly 9/100ths of one percent of the total population. See ROSENBLAT, *supra*, at 20-21 tbl. 1. This can be contrasted with the middle of the nineteenth century when blacks and mulattos made up a substantial portion of the population of Buenos Aires. See GEORGE REID ANDREWS, *THE AFRO-ARGENTINES OF BUENOS AIRES, 1800-1900*, at 64 (1980). One estimate indicated that up until 1850 up to forty percent of the Buenos Aires population was black. *Id.* As late as 1887, an Argentine census listed a black and mulatto population of 8005 out of Buenos Aires' population of 425,370 or some 1.8% of the city's total. See *id.* at 66.

Many reasons have been advanced for the "disappearance" including the extensive use of Afro-Argentine soldiers in Argentina's nineteenth-century wars. See *id.* at 4-5, 61-68, 81. Two reasons that have been advanced are important for our discussion. First, a comparison of the Argentine population in the nineteenth century with that of the twentieth century has to take into account that the Argentine population has risen considerably largely due to massive immigration since the end of the nineteenth century. See NICOLÁS SÁNCHEZ-ALBORNOZ, *THE POPULATION OF LATIN AMERICA: A HISTORY* 155 (W.A.R. Richardson trans., 1974). Nearly 3.5 million immigrants came to Argentina between 1881 and 1935. *Id.* According to one estimate, between 1841 and 1940, almost sixty percent of Argentina's population growth could be attributed to immigrants and the children of immigrants. See *id.* at 164. The percentage would of course be higher if the figure were simply calculated for the twentieth century.

The Argentine immigration figures helped make *blanquamiento*, the transformation of an American nation with visible Afro-American and Indian elements into a white nation more of a reality in Argentina than elsewhere in the hemisphere. I will discuss *blanquamiento* more thoroughly below, *infra* notes 277-292 and accompanying text. The notion of *blanquamiento* was that massive European immigration, coupled with intermarriage, would create a white nation. See PETER WADE, *BLACKNESS & RACE MIXTURE: THE DYNAMICS OF RACIAL IDENTITY IN COLOMBIA* 11-12 (1993). In Argentina, massive European immigration and the tendency to define the children of mixed marriages as white helped contribute to the "disappearance" of the Afro-Argentines. See SCOBIE, *supra*, at 33.

The disappearance is also partly an issue of perception. With the significantly larger population that Argentina has had in the twentieth century, current figures are close to thirty-seven million, the Afro-Argentine population could be somewhat substantial and still too small, relatively speaking, to be noticed. Given some of the social patterns that George Reid Andrews noticed in Argentina in the 1970s when he was conducting his study, the figure of 15,000 seems too small. See ANDREWS, *supra*, at 209-19. Andrews spoke of Afro-Argentine neighborhoods, employment patterns, stereotypes, and other indicia of Afro-Argentine life in modern Buenos Aires that indicate perhaps a larger population than Rosenblat's estimates, and this was in Buenos Aires alone. *Id.* And yet even if we double or even triple Rosenblat's figure, hypothetically raising the number to 30,000 or 45,000, enough to make Afro-Argentines an observable social phenomenon, and still their percentage of the Argentine population would be minuscule. Forty-five thousand Afro-Argentines, for example, would only be a little over one-tenth of one percent of the population, easily invisible to those not looking for such. Since Andrews wrote his study, the Afro-Argentine population has been significantly augmented by Afro-Uruguayan immigrants, with one estimate that there are 50,000 Afro-Uruguayan immigrants in the Buenos Aires area. See MARGARITA SANCHEZ & MICHAEL J. FRANKLIN, *INTER-AMERICAN DEVELOPMENT BANK, COMMUNITIES OF AFRICAN*

substantial numbers of African slaves working in gold mines, even though there is no visible Afro-Chilean population today.⁶⁸ Mexico is estimated to have received somewhere between 200,000 to 250,000 African slaves in the colonial era, greater than the number of Spaniards who came to Mexico during that period.⁶⁹ There are still substantial Afro-Mexican populations, especially in the states of Veracruz on the east coast and Guerrero and Oaxaca on the west coast, but their presence is overshadowed by the large Indian and Mestizo populations of Mexico.⁷⁰

ANCESTRY IN COSTA RICA, HONDURAS, NICARAGUA, ARGENTINA, COLOMBIA, ECUADOR, PERU, VENEZUELA 97 (1996).

For one Argentine historian's look at Afro-Argentines in a historical and contemporary perspective, see M. CRISTINA DE LIBOREIRO, *NO HAY NEGROS ARGENTINOS?* (1999). She estimates a contemporary Afro-Argentine population of about 100,000, which would be three-tenths of one percent of the population. *Id.* at 47. Finally, a conference was held on the subject of Afro-Argentines at the University of Belgrano in Buenos Aires, and the papers in that conference were published in the book, *EL NEGRO EN LA ARGENTINA: PRESENCIA Y NEGACIÓN* (Dina V. Picotti ed., 2001).

68. See generally William F. Sater, *The Black Experience in Chile*, in *SLAVERY AND RACE RELATIONS IN LATIN AMERICA*, 13, 13-50 (Robert Brent Toplin ed., 1974) [hereinafter *SLAVERY AND RACE RELATIONS*]. Sater notes that in 1813 there were a little over 30,000 individuals who could be classified as Negro or mulatto in the Bishopric of Santiago. *Id.* at 39-40. This was out of a population estimated at 382,704 persons. *Id.* Thus at the beginning of the nineteenth century roughly eight percent of the population of the Santiago area consisted of people who were visibly of African descent and classified as such. My statement that there is no current Afro-Chilean population has to be somewhat qualified. In the late 1940s and early 1950s, Argentine demographer Angel Rosenblat made an estimate of a very small Afro-Chilean population of some 500 blacks and 3000 mulattos out of a total Chilean population then consisting of over five million persons. See ROSENBLAT, *supra* note 67, at 20-21 tbl. 1. That would have made visible Afro-Chileans roughly seven-hundredths of one percent of the population. In June, 2000 at a conference titled *Race and Poverty: Inter-Agency Consultations on Afro-Latin Americans*, jointly sponsored by the World Bank, the Inter-American Dialogue, and the Inter-American Development Bank (IDB), I had the chance to meet with one Romero Rodriguez, the *director general* of a magazine titled *Mundo Afro*. *Mundo Afro* is published in Montevideo, Uruguay and specializes in articles on black life in southern cone nations (Argentina, Chile, Paraguay, Uruguay, and Bolivia). He indicated to me in conversation and correspondence that there may be a small group of Afro-Chileans in the north of the country, near the Peruvian border. He specifically referred to two families that he is trying to contact. E-mail from Romero Rodriguez, Director, *Mundo Afro* magazine, to Robert J. Cottrol, Harold Paul Green Research Professor of Law, George Washington University (Aug. 4, 2000) (on file with author.)

69. See GONZALO AGUIRRE BELTRÁN, *CUILA: ESBOZO ETNOGRÁFICO DE UN PUEBLO NEGRO* 8 (2d ed. 1989).

70. Mexican anthropologist and ethnohistorian Gonzalo Aguirre Beltrán (Aguirre Beltrán) remains the pioneer and central figure in Afro-Mexican studies. His principal work in the area was done in the 1940s and 1950s, but it still remains the point of departure for people investigating the field. In 1946, he published his first study, *La Población Negra de México*. It examined blacks in colonial Mexico and represented the first book-length treatment of the subject by a modern scholar. See GONZALO AGUIRRE BELTRÁN, *LA POBLACIÓN NEGRA DE MÉXICO 1519-1810: ESTUDIO ETNOHISTÓRICO* (1946). His second

From the beginning, the Portuguese and Spanish experiences with slavery differed from the experience in British North America. Very few Portuguese or Spanish settlers came to the Americas.⁷¹ In most American territories the small, predominately male Portuguese and Spanish settler populations uneasily ruled over large Indian populations.⁷² For a number of political and religious reasons, both the Portuguese and Spanish governments decided that although Indians would be subject to various forced labor regimes, they would not be formally enslaved.⁷³ Legal slave status would be reserved for Africans and their descendants. This, of course, added further to the anxieties of Portuguese and Spanish colonists as a growing population of African slaves were brought to the Americas to labor on the plantations and mines of the New World. Asserting and maintaining control over the majority of the population, which was neither Spanish nor Portuguese, was a major preoccupation of the Iberian settlers in a way that dwarfed similar concerns of the British settlers of North America.⁷⁴

If Portuguese and Spanish settlers came to the Americas with somewhat greater fears concerning their slave populations, they also arrived with a tool that their English counterparts initially lacked—an already well-developed body of slave law and law concerning free persons of African descent.⁷⁵ Portuguese and Spanish slave codes derived from the slave law of ancient Rome.⁷⁶ Spain received Roman law in the thirteenth century during the reign of Alfonso X, the Wise.⁷⁷ Roman law, including the Roman law of slavery, was codified into Spanish law in *Las Siete Partidas*.⁷⁸

In Latin America, Roman doctrine was modified in light of Spanish Christianity. Roman law, for example, was extremely harsh

study in the area, Cuijla, was an ethnographic study of an Afro-Mexican village in the state of Guerrero in the 1950s. See AGUIRRE BELTRÁN, *supra* note 69. For a valuable examination of slavery in early colonial Mexico, see COLIN A. PALMER, *SLAVES OF THE WHITE GOD: BLACKS IN MEXICO, 1570-1650* (1976).

71. See KLEIN, *supra* note 59, at 18-19.

72. *Id.*

73. *Id.*

74. The degree of anxiety over African and Indian populations could be, and often was, quite high in the North American colonies. One difference was that whites quickly became the majority in most North American colonies. One major exception to this was South Carolina in the eighteenth century. See PETER H. WOOD, *BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION* (1974).

75. See ALAN WATSON, *SLAVE LAW IN THE AMERICAS* 63-65 (1989).

76. *Id.* at 40.

77. *Id.* at 42-46.

78. *Id.*

against potential slave rebellions.⁷⁹ If a slave killed his master, Roman law specified that all the slaves in the household were to be put to death.⁸⁰ The law prescribed that this was to be accomplished before the reading of the deceased master's will so that no slave in the household could be freed and hence be ineligible for execution.⁸¹ Spanish law confined punishment in such cases to the slaves actually responsible for the killing.

Spanish and Portuguese law was concerned with far more than simply establishing a disciplinary code for slaves, as important as that was. The law was also concerned with the assignment and preservation of status. It specified how a slave might be set free, preserving much of the Roman law doctrine on this topic.⁸² Portuguese and Spanish law, especially municipal ordinances, sought to control the behavior of slaves and free blacks who lived and worked in cities like Lisbon and Madrid, or who toiled on the sugar plantations in the Azores and Cape Verde islands.⁸³ There were even ordinances in Lisbon, Madrid, and the other cities of Portugal and Spain that strangely anticipated the Jim Crow regulations of the U.S. South in the early twentieth century. There existed laws forbidding free Negroes from wearing clothing above their station, or carrying swords, and other kinds of status regulations.⁸⁴

Portuguese and Spanish laws regulating slaves and free people of color were adapted to meet immediate needs. Both nations, even before Columbus's voyages of exploration, were in a process of expanding from a system of domestic slavery, where slaves were employed to expand the household labor force, to a system of what

79. ALAN WATSON, *ROMAN LAW AND COMPARATIVE LAW* 102-04 (1991).

80. *Id.*

81. *Id.*

82. Eunice Prudente, for example, notes that the law in nineteenth-century Brazil, which was unchanged from the earlier Portuguese code, preserved some of the strong paternalism found in the Roman slave code. The Roman slave code permitted masters to engage in the partial freeing of slaves. The partially manumitted slave would be classified as a *liberto*. A *liberto*, while free, had a revocable freedom. His former master could re-enslave him if the slave showed ingratitude. See PRUDENTE, *supra* note 9, at 95; *infra* notes 239-241 and accompanying text.

83. See JOSE LUIS CORTÉS LÓPEZ, *LA ESCLAVITUD NEGRA EN LA ESPAÑA PENINSULAR DEL SIGLO XVI* 89-91 (1989); FREDERIC MAURO, *LE PORTUGAL, LE BRESIL ET L'ATLANTIQUE AU XVIIIE SIECLE (1570-1670): ETUDE ECONOMIQUE* 165-66 (1983); WILLIAM D. PHILLIPS, JR., *HISTORIA DE LA ESCLAVITUD EN ESPAÑA* 168 (1990); A.C. DE C.M. SAUNDERS, *A SOCIAL HISTORY OF BLACK SLAVES AND FREEDMEN IN PORTUGAL 1441-1555*, at 113-33 (1982); ALFONSO FRANCO SILVA, *LA ESCLAVITUD EN ANDALUCÍA 1450-1550*, at 105-10 (1992).

84. Estelle T. Lau, *Can Money Whiten? Exploring Race Practice in Colonial Venezuela and Its Implications for Contemporary Race Discourse*, 3 MICH. J. RACE & LAW 417, 427-28 (1998).

some historians have termed industrial slavery, where slaves would supply the principal labor force for an expanding export economy built around plantation agriculture or mining.⁸⁵ The development of sugar plantation agriculture in the Azores and in the Canary and Cape Verde islands, made slavery more important to the economies of Portugal and Spain.⁸⁶ It also brought significant numbers of Africans into both nations, making questions of race and status more critical.

Although the slave laws of Portugal and Spain were concerned with the immediate question of governing the growing African populations of the two nations, there is one way that the law of slavery made an enduring contribution to the culture of race relations in Latin America: the laws of Spain and Portugal reflected a stringent concern with group classification. This concern would increase with the Spanish and Portuguese settlement of what would become Latin America. Spanish and Portuguese settlers in the Americas, aware of their minority status, sought to maintain rigid separations among the different African, Indian, and mixed peoples that they ruled.⁸⁷ This was to be accomplished through codification, the development of a highly precise system of racial classification through law.⁸⁸ Spanish lawmakers were particularly artful at this, importing racial categories developed in Spain and adding to them classifications developed in the New World.⁸⁹ Mexican anthropologist Gonzalo Aguirre Beltrán reported on one such scheme employed in eighteenth-century Mexico.⁹⁰ The codified categories indicated the designation and status of individuals according to the race and color of an individual's parents.⁹¹ The offspring of a:

1. Spaniard with an Indian woman is a Mestizo;
2. Mestizo woman with a Spaniard is a Castizo;
3. Castizo man with a Spanish woman is a Spaniard;
4. Spaniard man with a Black woman is a Mulatto;
5. Mulatto woman with a Spaniard is a Morisco;
6. Morisco man with a Spanish woman is a Chino;⁹²

85. See KLEIN, *supra* note 59, at 1-5.

86. See HUGH THOMAS, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE: 1440-1870*, at 123-24 (1997).

87. See LESLIE B. ROUT, JR., *THE AFRICAN EXPERIENCE IN SPANISH AMERICA, 1502 TO THE PRESENT DAY* 133 (1976).

88. *Id.* at 126-34.

89. *Id.*

90. See AGUIRRE BELTRÁN, *supra* note 70, at 176-77.

91. *Id.*

92. Note that *Chino* translates as Chinese in Spanish, but it is also employed in Latin America to describe people with light complexions who nonetheless have discernible African

7. Chino man with an Indian woman is a Step Backward;
8. A Step Backward man with a Mulatto woman is a Wolf;
9. A Wolf man with a Chino woman is a Gibaro;
10. A Gibaro man with a Mulatto woman is a Leper;
11. A Leper man with a Black woman is a Cambujo (very dark);
12. A Cambujo man with an Indian woman is a Zambaigo;⁹³
13. A Zambaigo man with a Wolf woman is a Calpa Mulatto;
14. A Calpa Mulatto man with a Cambujo woman is a Stay in the Air;
15. A Stay in the Air man with a Mulatto woman is an I Don't Understand Thee; and
16. An I Don't Understand Thee man with an Indian woman is a Step Backwards.⁹⁴

This and other similarly meticulous classification schemes were developed in part to strengthen Portuguese and Spanish rule in the Americas. Spanish colonial law in particular attempted to group the different racial categories into different castes with differing sets of legal privileges.⁹⁵ This was done as part of a divide-and-rule strategy. Spanish and Portuguese colonial administrators were particularly concerned with preventing the subject peoples in their American colonies, the African, Indian, and mixed race populations, from making common cause. Their idea was that a strictly codified caste system—the Spanish actually used the word *casta* or *caste*—would foster a strict separation of the differing groups, facilitating Spanish or Portuguese rule.⁹⁶

The legal attempt to make fine racial distinctions had an ironic consequence. Far from strengthening the boundaries between the different subordinate groups, the multiplicity of racial classifications actually contributed to a culture of racial mobility and what, to North American eyes, appears to be a culture of racial ambiguity in Latin American societies.⁹⁷ It would become possible to improve one's racial

ancestry, somewhat similar to the term "high yellow," which was used in parts of the United States early in the twentieth century.

93. The term *Zambo* is a common term for people of mixed African-Indian heritage in Spanish-speaking Latin America. The term seems to have fallen in some disfavor in recent times especially in Mexico, perhaps because of its similarity to the North American term 'Sambo.' The term *Afromestizo* appears to be preferred for those of mixed African and Indian background.

94. AGUIRRE BELTRÁN, *supra* note 70, at 176-77.

95. See *id.* at 153-54; PALMER, *supra* note 70, at 38-42.

96. See PALMER, *supra* note 70, at 36-38.

97. See Lau, *supra* note 84, at 422-28.

standing with the improvement of one's social standing. If being white meant that one was at the top of the social pyramid, while being black meant that one was at the bottom, these were not legally immutable characteristics.⁹⁸ The successful individual, the military captain, the person who struck it rich in the gold fields, those whom fortune smiled upon, could aspire to be white. In some cases, legal recognition of one's "whiteness" could actually be purchased.⁹⁹ Even if whiteness might be beyond an individual's grasp, a free person of African descent might aspire to be recognized as a Mulatto, a Morisco, or some other mixed category.¹⁰⁰

Racial mobility, of course, can only exist where there is a clear notion of racial hierarchy or stratification. Firm notions of the proper place and status of the three races existed in Spanish and Portuguese thought. Whites were deemed superior. Indians, as a group, were seen as nobler than Africans. As might be expected, this picture became more complicated when cultural issues and racial mixtures came into play. As Africans, and more particularly their Afro-American descendants, adapted to the Portuguese and Spanish cultures, they became part of Latin American colonial societies. Because Africans were enslaved, more of them were likely to adopt the principal features of the Portuguese and Spanish cultures, particularly language and religion, than Indians, many of whom were effectively beyond the control of their nominal European masters.¹⁰¹ This helped to create a system of racial stratification, a pyramid if you will, which persists to the present day in most Latin American nations. Whites generally have a superior status. People of Indian racial background whose cultural practices are mainly of Portuguese or Spanish derivation—Portuguese or Spanish is their first language, Catholicism is largely unmixed with indigenous religious practices—would be next on the social ladder. Mestizos, people of mixed indigenous and white background, would have a higher rating than those of largely Indian background. At the bottom of the social pyramid would be Afro-Americans, with mulattoes occupying a higher social status than blacks. Indians who retain indigenous cultural patterns—and in most nations Indians are

98. *See id.*

99. *Id.* at 418-19, 435-40.

100. *Id.* at 440-42.

101. The relatively small numbers of European settlers frequently meant that the Indian groups most likely to fall under Spanish or Portuguese domination were those in coastal regions. For a discussion of the small number of Spanish and Portuguese settlements, see *supra* note 71 and accompanying text.

defined culturally, not racially¹⁰²—are frequently viewed as being outside the society's social structure, frequently with devastating results.¹⁰³ It was in this hierarchical framework that law in colonial Latin America provided a formal legitimization to the notion of racial mobility.

It should be quickly acknowledged that the law's role in creating this culture of racial mobility, although real, was probably of somewhat minor importance. More than any other reason, demography dictated that Brazil and the Spanish colonies adopt a fluid view of racial classification. With their small European populations, Latin American colonial societies could not have functioned without allowing significant numbers of people of African and indigenous descent to rise within the different societies. The military and economic needs of those colonies dictated the rise of large free Afro-American populations, mostly (but not exclusively) from the ranks of those of mixed racial backgrounds.¹⁰⁴ These needs also dictated that the population be allowed to join the ranks of citizens and that a certain fluidity in racial definition be permitted.¹⁰⁵

The history of Afro-American slavery in Latin America is a long and complex one that cannot be examined here. The system of African

102. See, e.g., Marta Inurozqui, *The Sound of the Pututos: Politicisation and Indigenous Rebellions in Bolivia, 1826-1921*, 32 J. LATIN AM. STUD. 85 (2000).

103. Professor Stephen Morris notes the often ambiguous treatment of Indian culture in Mexico:

On the one hand, as noted, a sense of glory regarding the Indian past has long been an important part of the nation's identity. Ever since independence, governments have trumpeted this theme to mobilise supporters and/or demobilise opponents. Yet despite this strand, and in certain cases even underlying it, lay a discourse that casts the Indian and the Indian culture as not truly Mexican, but rather as impediments to the unification of the nation and obstacles to its political, economic and cultural development: in short, a threat to the nation's interests. *Mestizaje* was thus touted as the solution to this problem: a process of transforming the indigenous both racially and culturally, thereby forging national unity and overcoming obstacles to development. Such a view clearly contrasts with the notion of *mestizaje* as a cultural synthesis or a form of multiculturalism. Even in the early twentieth-century, President Lazaro Cardenas pursued a policy framed by this discourse: a policy that sought 'not to Indianize Mexico, but to Mexicanize the Indian.'

Stephen D. Morris, *Reforming the Nation: Mexican Nationalism in Context*, 31 J. LATIN AM. STUD. 363, 374-75 (1999) (footnote omitted).

104. For a comparative discussion of free Afro-American populations in the slave societies of the New World, see NEITHER SLAVE NOR FREE: THE FREEDMEN OF AFRICAN DESCENT IN THE SLAVE SOCIETIES OF THE NEW WORLD (David W. Cohen & Jack P. Greene eds., 1972).

105. I will return to this issue with an examination of the specific histories of Brazil and Colombia later in this Article. See *infra* Part IVB-C.

household and industrial slavery that began in Spain and Portugal early in the fifteenth century would ultimately end in Latin America in the nineteenth. Here the histories of Brazil and the Spanish-speaking nations of the hemisphere took very distinct paths. Spain's American colonies began the process of emancipation as part of their struggles for independence from Spain. Some of the emerging nations abolished slavery outright when they attained independence and adopted new constitutions.¹⁰⁶ Others developed gradual emancipation schemes that put an end to formal chattel slavery within a generation after the attainment of independence.¹⁰⁷ Puerto Rico and Cuba, which would remain Spanish colonies until the end of the nineteenth century, would retain slavery throughout most of the nineteenth century.¹⁰⁸

Brazil would have the longest experience with Afro-American slavery. Although Brazil would attain independence in 1822, it would become independent as an empire, complete with an emperor and an economy very much centered around plantation agriculture and slavery.¹⁰⁹ Brazil would resist much of the antislavery currents of nineteenth-century liberal thought. The Brazilian Empire would only reluctantly agree to end the slave trade in 1850, more than forty years after Britain and the United States had outlawed the trade.¹¹⁰ Slavery was finally abolished in Brazil in 1888.¹¹¹ The circumstances of abolition and its relationship to postemancipation race relations will be discussed below.

B. Race and Contemporary Afro-Latins: The Elusive Problem

Slavery has left a mixed legacy to the American hemisphere. There are visible Afro-American populations throughout the hemisphere. Every nation in the Americas numbers among its citizens descendants of African slaves, most who are classified as black or mulatto, and some who are numbered among the white or mestizo populations of their nations. Here, just as in our previous discussion with slave importation, it might be useful to attempt to contrast the size

106. See ROUT, *supra* note 87, at 279.

107. *Id.* at 236-41.

108. See BERGARD ET AL., *supra* note 66, at 34; GORDON K. LEWIS, PUERTO RICO: FREEDOM AND POWER IN THE CARIBBEAN 58-59 (1963).

109. See ROBERT CONRAD, THE DESTRUCTION OF BRAZILIAN SLAVERY 1850-1888, at 15-17 (1972).

110. See KLEIN, *supra* note 59, at 191.

111. For discussions of the abolition of slavery in Brazil, see CONRAD, *supra* note 109, at 135-277; ROBERT BRENT TOPLIN, THE ABOLITION OF SLAVERY IN BRAZIL 194-224 (1971); EMÍLIA VIOTTI DA COSTA, DA SENZALA A COLÔNIA 428-55 (1966).

of the black population of the United States with the Afro-American population in the hemisphere as a whole. This is a somewhat difficult task. While the records of slave-trading companies, combined with tax records, have given demographic historians a reasonably accurate portrait of the size of the slave trade and the destinations of the African captives who came to the Americas, the data are much less firm on contemporary Afro-American populations.

The first problem is one of definition. Who should we count as Afro-Brazilian, Afro-Mexican, or Afro-Colombian? To North Americans, that seems like an incredibly easy question. We are accustomed to viewing anybody with traceable African ancestry as black. Surely, even conceding to Latin Americans that blacks and mulattos are distinct groups and that our notion of hypo-descent is carrying things a bit far, we should be able to determine if there is a proximate black ancestor, perhaps drawing the line at grandparents or great-grandparents, and thus, decide if an individual might fall into an Afro-American category. This should not be too difficult. It is. Concepts that either developed or intensified during slavery, views of black inferiority, and notions of racial mobility complicate the task of determining who should be included in the Afro-American population of Latin America. If U.S. history and culture dictated that anyone with traceable African ancestry was to be included in the black population, circumstances during slavery and after emancipation in Latin America dictated almost exactly the opposite—people of mixed background or even people largely of African ancestry above a certain social standing were to be counted as something other than black.¹¹²

There is yet another level of complexity that must be added to the question of who should be counted as an Afro-American within the Latin American context. After awhile, the North American researcher begins to get the hang of things. There is a strong distinction between blacks and mulattos. There are individuals with admitted black ancestors who regarded themselves, and are regarded by others, as white or mestizo. Racial mobility is possible—you need not remain a member of the racial group into which you were born. Just as you get used to these ideas, certain facts throw a curveball or two your way. If it is true that phenotype and social position determine race—and not remote ancestry, as has been the case in the United States—why is the tragic mulatto story a genre in Latin American as well as North

112. See ANTHONY W. MARX, *MAKING RACE AND NATION: A COMPARISON OF SOUTH AFRICA, THE UNITED STATES, AND BRAZIL* 65-69 (1998).

American fiction?"¹¹³ Or why does one occasionally encounter individuals who are phenotypically white or Indian who nonetheless identify themselves as Afro-Colombians or Afro-Mexicans? These seeming counterexamples tend to make the North American student of race even less surefooted when traversing the difficult terrain of race and status in Latin America.

In some cases African ancestry is denied altogether, even when it is apparent. The population of the Dominican Republic, for example, is predominately of African descent. Only a minority of the population is phenotypically white, and a majority of that group probably has some African ancestry.¹¹⁴ Despite this, it has been customary among some Dominicans, until relatively recently, to define themselves as Indians, or descendants of Indians, and not as Afro-Dominicans. Blacks have frequently used the term *Indio Oscuro*, or Dark Indian, while mulattos have tended to use the term *Indio Claro*, or Light Indian.¹¹⁵ This tendency has in part reflected the traditional higher status for people of Indian descent in Latin America, as well as the fact that Haitians have traditionally been seen as the "other" in Dominican society.¹¹⁶

All of this makes determining the size and scope of the Afro-American population in the Western Hemisphere a somewhat difficult undertaking. This task is made yet more difficult because, with the exception of Brazil, most of the nations of Latin America have not kept systematic records of their African-descended populations in national censuses.¹¹⁷ Angel Rosenblat's population estimates, done in the late

113. One of the more famous examples of the genre was the 1948 Mexican film, *ANGELITOS NEGROS* (Producciones Rodríguez Hermanos 1948). The film bore a strong resemblance to, and was doubtless influenced by, Fannie Hurst's U.S. novel, *IMITATION OF LIFE* (1933). The book dealt with a romance between a phenotypically white woman with a black mother and a white man. See *id.*; see also Sandra Lois Dixon, *Racial Identity and Literary Image: The Characterization of Afro-Hispanics and Whites in Selected Novels of Venezuela and Brazil* 56-59, 87-89 (1986) (unpublished Ph.D. dissertation, Brown University) (on file with University Microfilms International, Ann Arbor, Michigan).

114. CARLOS ANDÚJAR PERSINAL, *LA PRESENCIA NEGRA EN SANTO DOMINGO: UN ENFOQUE ETNOHISTÓRICO* 9 n.5 (1997) (citing FRADIQUE LIZARDO, *CULTURA AFRICANA EN SANTO DOMINGO* 26 (1979)).

115. *Id.* at 1-11 (discussing the general tendency in Dominican Republic to deny African roots).

116. See FRANKLIN FRANCO PICHARDO, *SOBRE RACISMO Y ANTIHAITIANISMO (Y OTROS ENSAYOS)* 75-99 (1997). In this book, Dominican historian Franklin Franco Pichardo discusses racism and anti-Haitian sentiment in the recent history of the Dominican Republic. See *id.*

117. The IDB sponsored a conference in Cartagena, Colombia, in November 2000 to discuss the issue of race in the censuses in different Latin American nations. See *Political Feasibility Assessment: Country Potential for New Research on Race in Latin America:*

1940s, are frequently taken as a point of departure for estimates of racial groups in the Americas.¹¹⁸ Rosenblat's estimates indicated that in 1950, throughout the hemisphere, there was a black population of nearly 29 million and a mulatto population of a little over 19 million.¹¹⁹ This would make an Afro-American population of approximately 48 million in a hemisphere that then had a little more than 326 million inhabitants.¹²⁰ Thus, according to Rosenblat's estimates, Afro-Americans counted for nearly 15% of the inhabitants of the Americas.¹²¹ However, a study done by the Interamerican Development Bank (IDB) in 1996 indicated a population of some 150 million persons of African descent in Latin America out of an estimated 471 million persons in the region.¹²² These figures would make the Afro-American population roughly 32% of the population of the region as a whole. The differences between the Rosenblat and IDB estimates can in part be attributed to the difficult question of who should be counted as Afro-American within the Latin American context.

By any estimate the Afro-American population of Latin America is substantial. In some countries, including Brazil, Colombia, Cuba, the Dominican Republic, and Venezuela, people of visible African descent make up one-third or more of the population.¹²³ In other

Executive Summary, in BANCO INTERAMERICANO DE DESARROLLO, TODOS CONTAMOS: LOS GRUPOS ETNICOS EN LOS CENSOS: 1 ENCUENTRO INTERNACIONAL (2000) [hereinafter TODOS CONTAMOS].

118. See ROSENBLAT, *supra* note 67.

119. See *id.* at 20-21 tbl. 1. Rosenblat's figures are problematic in several ways. First, he does not include figures for the British Caribbean. Second, his table understates the number of mulattos relative to blacks because he, following the U.S. census model, counts all Afro-Americans in the United States and Canada in the black category. *Id.* Finally, Rosenblat acknowledged that his racial categories were very unstable. See *id.* at 19.

120. See *id.* at 20-21 tbl. 1.

121. *Id.* Rosenblat's numbers reveal an important bit of demographic history. Even recognizing the imprecision of his figures, it is interesting to note that in 1950 roughly one-third of those people in the hemisphere who were identifiable as Afro-Americans lived in the United States. See *id.* You will recall that less than six percent of the Africans brought to the Americas came to the United States. See *supra* note 59 and accompanying text. There are several reasons for this disparity. Certainly *blanquamiento* may have played a role in reducing the number of people counted as Afro-Americans in Latin America. See *supra* note 67 and accompanying text. Also, the United States has received a substantial number of Afro-Caribbean immigrants in the twentieth century, thus increasing the size of the Afro-American population in the United States. See *infra* note 127 and accompanying text. Historians of slavery have pointed out that another reason for the increase in the percentage of Afro-Americans in the United States in the twentieth century is that slaves in the United States did not have the high mortality rates that were found in Latin America, particularly in areas like Brazil and the Caribbean. See CURTIN, *supra* note 60, at 83-93.

122. See SANCHEZ & FRANKLIN, *supra* note 67, at 15-17.

123. See ROSENBLAT, *supra* note 67, at 20-21 tbl. 1.

nations, Mexico and Peru for example, there are substantial Afro-American populations, but their presence tends to be overshadowed by the large indigenous populations and the tensions between the white and mestizo populations and those who retain an indigenous culture.¹²⁴ In a number of Latin American nations, the Afro-American population is quite small, and there has been a tendency to claim that they have disappeared altogether.¹²⁵ This has been true, to varying degrees, of Argentina, Chile, and Uruguay in the twentieth century.¹²⁶ In some countries, the Afro-American population is largely an immigrant population, particularly in many Central American nations, where there has been large English-speaking Afro-Caribbean immigration in the twentieth century.¹²⁷ In a number of nations, this has added an overlay of cultural conflict in addition to their racial conflict.

Despite significant variations in the different nations, certain common patterns with respect to race and discrimination regularly appear in the historical and social science literature discussing Afro-Americans in Latin America. Racial hierarchy, a social pyramid with blacks on the bottom and whites on top, the idea of relative fluidity in racial classifications, and the concept of racial mobility have all been reasonably well-explored in the recent social science literature. A generation or two ago, historians and social scientists, partly influenced by the contrast with the Jim Crow United States, were likely to describe racial interactions in Latin America in terms of the concept of "racial democracy," attributing the different conditions under which blacks and whites lived to class differences, not racial discrimination.¹²⁸

124. See generally 2 *BLACKNESS IN LATIN AMERICA AND THE CARIBBEAN: SOCIAL DYNAMICS AND CULTURAL TRANSFORMATIONS* (Arlene Torres & Norman E. Whitten, Jr. eds., 1998) [hereinafter *BLACKNESS IN LATIN AMERICA AND THE CARIBBEAN*].

125. See *supra* note 68 and accompanying text.

126. See *id.*

127. See, e.g., CARLOS MELÉNDEZ & QUINCE DUNCAN, *EL NEGRO EN COSTA RICA* 71-75 (2d ed. 1974).

128. There is a large and growing body of literature attacking the myth of racial democracy in Latin America. Much of this literature is a valuable corrective to the prevailing historical and social science literature of the early and mid-twentieth century that uncritically accepted the view that Latin American nations were racial democracies free from discrimination. See *infra* note 297 and accompanying text. Still, as historian Alejandro de la Fuente points out, the literature attacking the myth of racial democracy has not fully come to terms with the fact that historically there has been a racial inclusiveness in Latin America that was absent in the United States, and that the ideology of racial democracy and race mixture, or *mestizaje*, did play a role in fostering norms of racial inclusion and national unity in Latin American societies despite the racial prejudices and racial hierarchies that existed. See Alejandro de la Fuente, *Myths of Racial Democracy: Cuba, 1900-1912*, 34(3) *LATIN AM. RES. REV.* 39, 45-46 (1999). Fuente, whose focus was on early twentieth-century Cuba, correctly noted the presence of black and mulatto police and military officers as well as

Today there is a much greater willingness in the literature to recognize the extent of Latin American racial discrimination in areas like employment, public accommodations, receipt of government services, and even areas like public stereotyping and racial insult.¹²⁹ There are efforts in some Latin American countries to strengthen antidiscrimination laws.¹³⁰ There is also a debate over how much might be learned from the U.S. experience in this area.

IV. SLAVERY, FREEDOM, AND THE LAW—DIFFERING AMERICAN EXPERIENCES

The comparative study of the law of slavery in the Americas can be a tremendously fertile area of inquiry, but it is one that should be approached with great caution. The scholarship on the topic has largely been dominated by frames of reference that were established by sociologist Frank Tannenbaum in the 1940s.¹³¹ Tannenbaum was concerned with law as a factor that greatly influenced the treatment of slaves in different American societies.¹³² The Tannenbaum thesis might be simply summarized along the following lines. Slavery in Latin America differed greatly from slavery in the United States in large part due to profound differences in law or legal systems. Both the Portuguese and the Spaniards came to the New World with a highly developed body of slave law.¹³³ That law governed the rights and duties of master and slave.¹³⁴ The law of slavery in both kingdoms was derived from Roman law and was heavily modified by the influence of the Catholic Church.¹³⁵ Law in Latin America prescribed certain protections for slaves including prohibitions against inhumane treatment, protection for the right to marry and maintain a family, and the right to enter into manumission contracts, which forced masters to

members of Congress in early twentieth-century Cuba, at a time when blacks were virtually barred from such positions in the United States. See *id.* at 59-60.

129. For a good anthology of ethnographic literature on Afro-American populations and communities in Latin America, see *BLACKNESS IN LATIN AMERICA AND THE CARIBBEAN*, *supra* note 124.

130. See *infra* notes 298-300 and accompanying text.

131. See TANNENBAUM, *supra* note 1.

132. *Id.* at viii-ix.

133. See WATSON, *supra* note 75, at 47, 63-65; see also *supra* notes 75-84 and accompanying text.

134. See TANNENBAUM, *supra* note 1, at 48-56.

135. *Id.*; see *supra* notes 75-84 and accompanying text.

allow slaves to purchase their freedom at legally enforceable prices.¹³⁶ As a consequence, the system of slavery in Latin America was more humane. The relatively humane treatment of slaves in Latin America ultimately led to a more egalitarian pattern of race relations after the abolition of slavery than was to occur in the United States.

The Tannenbaum thesis would set the terms of debate for students of comparative slavery for at least two generations after the 1946 publication of *Slave and Citizen*, his principal work in the field.¹³⁷ Without getting too far into that debate, it is useful to make two points concerning Tannenbaum's contribution to the dialogue on comparative slavery and race relations. First, Tannenbaum unquestionably played a critical role, probably the most critical role, in convincing American academics of the essential accuracy of the racial democracy thesis concerning Latin America. Second, I believe that Tannenbaum had a relatively unsophisticated approach to the legal history that was at the heart of his thesis. Tannenbaum's study was not a multilayered, textured examination of the law. It did not explore the varied legal cultures of either the United States or Latin America with their often overlapping, and frequently conflicting, sources of law and legal authority. Nor was Tannenbaum's study particularly sensitive to legal change or regional and historical variation—all factors critical to an appreciation of the role of law in the history of slavery in the American hemisphere. Tannenbaum's study nonetheless retains its importance both for having set the terms of the debate and also for presenting the

136. See WATSON, *supra* note 75, at 22-39 (discussing the right of self-purchase as a major Latin American inheritance from Roman law and one of the principal differences between the law of slavery in the United States and Latin America).

137. For example, in the 1960s, historian Eugene Genovese noted that the debate over comparative slavery could be clarified if researchers would recognize that the notion of the "treatment of slaves" actually embraced three different concepts. See Eugene D. Genovese, *The Treatment of Slaves in Different Countries: Problems in the Applications of the Comparative Method*, in *SLAVERY IN THE NEW WORLD* 202-03 (Laura Foner & Eugene D. Genovese eds., 1969). Genovese outlined the three meanings of treatments as follows:

1. *Day-to-Day living conditions*: Under this rubric fall such essentially measurable items as quantity and quality of food, clothing, housing, length of the working day, and the general conditions of labor.
2. *Conditions of life*: This category includes family security, opportunities for an independent social and religious life, and those cultural developments which, as Elkins has shown, can have a profound effect on the personality of the slave.
3. *Access to freedom and citizenship*: This is the meaning for "treatment" that is implied in the work of Frank Tannenbaum and those who follow him closely. It ought to be immediately clear that there is no organic connection between this and the first category and only an indirect connection between this and the second.

case for the importance of legal norms in determining the often contrasting conditions under which slaves lived.

That theme was also central to Alan Watson's comparative inquiry, *Slave Law in the Americas*.¹³⁸ Watson used his training as a specialist in Roman law to study the issue of the law of slavery in the Western Hemisphere.¹³⁹ Among other issues, his study focused on how slave law in the U.S. South was uniquely unfriendly to manumission.¹⁴⁰ This was in contrast to the slave codes in the colonies of Spain, Portugal, the Netherlands, and France, all of which offered legal protection for manumission.¹⁴¹ Watson attributed this largely to the Roman law heritage of those colonies.¹⁴² Roman law had established a body of rules recognizing and encouraging the slave's right to manumission under appropriate circumstances.¹⁴³ U.S. law, derived from the English common law, which did not recognize slavery, had developed no such doctrine.¹⁴⁴

Both Tannenbaum and Watson approached the issue of comparative slave law with assumptions concerning law's efficacy and autonomy. For Tannenbaum, societal differences could largely be explained through an examination of different legal regimes and their presumed impact on social practices. Watson is more cautious on this subject, in part because he had the benefit of the research of more than a generation of comparativists who had cast severe doubt on many of Tannenbaum's conclusions. But Watson nonetheless also assumes the autonomous nature of the law and legal culture and that legal culture can retain strong power to influence behavior, even in the face of radically altered social circumstance.¹⁴⁵

My assumptions are somewhat different. I agree that law played a critical role in creating the complex and multilayered set of human relations that went under the title of slavery. More importantly for our purposes, the law of slavery played a unique role in structuring the vocabulary and grammar of New World racial identities and interracial relations. But it seems that in both British and Latin America, the law would have a lesser role as an independent agent reflecting the singular norms of an autonomous legal culture and a greater role as a conduit

138. See WATSON, *supra* note 75.

139. *Id.*

140. *Id.* at 128.

141. *Id.* at 62, 90, 99, 113, 128-29.

142. *Id.* at 128-29.

143. *Id.* at 40-114, *passim*.

144. *Id.* at 128.

145. See *id.* at 127-28.

or reflector of larger societal currents—social, economic and ideological. This does not mean that the differing legal systems were without impact. The law of slavery had a profound impact, but mainly because the law reflected and modified the demands of the larger culture, not because it acted as an independent agent.

In a real sense the law of slavery might best be analogized to the concept of the intervening variable found in certain kinds of quantitative social research. Intervening variables stand between independent and dependent variables.¹⁴⁶ They are acted upon and are modified by independent variables and, in turn, act as independent variables acting on and modifying dependent variables.¹⁴⁷ During the process, the intervening variable modifies the effect of the independent variable on the dependent variable.¹⁴⁸ This is a particularly appropriate way to think of the workings of New World legal systems with respect to slavery.

Tannenbaum performed an invaluable service by the way he framed the issue of law and race. For students of comparative race relations, the most important questions concern how the law of slavery influenced the treatment of slave populations and the effect that treatment had on race relations both during and after slavery.¹⁴⁹ The aspect of treatment most influenced by the law and which had the most enduring impact on race relations was what historian Eugene Genovese has termed access to freedom and citizenship.¹⁵⁰ Free people of African descent existed in all the slave societies of the Americas, as indeed they had existed in metropolitan Spain and Portugal. Every slaveholding society had a body of law regulating manumission and the status of free or freed persons of color. The relative receptivity or hostility of different slaveholding societies to free Negro populations

146. See, e.g., W. LAWRENCE NEUMAN, *SOCIAL RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPROACHES* 98 (2d ed. 1994).

147. *Id.*

148. *Id.*

149. The law of slavery can and does have importance for other scholarly concerns. Thus Robert Cover found the law of slavery to be a helpful vehicle for exploring how jurists reconcile conflicts between normative values and positive law. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 192-93, 197-200 (1975). Mark Tushnet used the law of slavery to help explain how jurists strike a balance between the interests of dominant classes and the ideological and normative values of the legal culture. See MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* 18-27 (1981). A number of scholars have used the emerging law of U.S. slavery in the early nineteenth century as a counterpoint to common law developments elsewhere in the United States. See, e.g., THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860* (1996).

150. See Genovese, *supra* note 137, at 203.

provided an important indicator of the kind of formal racial barriers that would develop, or fail to develop, after general emancipation.

This Part will concentrate on the four slave societies from the late eighteenth century until general emancipation. Although earlier aspects of the legal history of slavery are important and will be discussed, the latter period is of special significance. It is in this latter period that the liberal ideas of the Enlightenment first posed a challenge to slavery and the law governing slavery.¹⁵¹ Liberalism would change the law. In some venues it would help bring about the abolition of slavery; in others it would bring about measures to strengthen the institution. But there would be no area in what was the American world of chattel slavery that would remain untouched. I am also focusing on this latter period because it is closest in time to general emancipation in the four societies. Patterns of racial interaction that developed just before emancipation will probably tell us more about slavery, and the law of slavery's legacy to postemancipation race relations, than studying the law of race and slavery in more remote times. This Part is subdivided into three sections which will examine various aspects of the legal history of slavery in a rough outline. Section A deals with the United States, Section B discusses Brazil, and Section C examines Colombia and Venezuela under the title "Spanish America."

A. *The United States*

Any researcher attempting to provide a quick outline of the U.S. law of slavery, or even one aspect of the institution, like the law's attitude toward manumission and the status of free Afro-Americans, soon realizes, or should realize, the enormity and complexity of the task. Most studies of U.S. slavery, until relatively recently, have focused on the decades immediately before the Civil War.¹⁵² Yet U.S. slavery lasted much longer than that. The law in English-speaking North America first formally gave its sanction to the practice of reducing some human beings to legal chattel in New England in the 1640s.¹⁵³ That sanction would finally be withdrawn more than two

151. See Cotrol, *supra* note 10, at 362-64.

152. But see IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* (1998) (focusing on slavery before the emergence of the antebellum cotton kingdom).

153. LORENZO JOHNSTON GREENE, *THE NEGRO IN COLONIAL NEW ENGLAND* 18-19, 63-64 (Atheneum 1968) (1942). By English-speaking North America, I am referring to those English colonies that ultimately became the United States. It should nonetheless be noted that legal slavery also existed in those French, and later English, colonies that would

centuries later in the wake of Appomattox and after the final ratification of the Thirteenth Amendment. Slavery existed in English-speaking North America for a century longer than the period between the adoption of the Thirteenth Amendment and the present.

The body of law that governed U.S. slavery changed frequently during this long period. The law also had considerable regional variations, a quality that partly can be attributed to the highly localized nature of much of U.S. law. From the beginning, the Anglo-American law of slavery had to wrestle with a very difficult paradox. U.S. law was a derivative of the English common law. If the full-blown, refined common law of England did not migrate easily to the rough English colonies of the seventeenth century, the common law as cultural precept certainly influenced early lawmakers.¹⁵⁴ The common law did not recognize slavery.¹⁵⁵ Indeed the common law proclaimed slavery unlawful, contrary to natural law, and an institution that could not be maintained in England.¹⁵⁶ And if slavery was met with the common law's disfavor, it would appear to have severely clashed with an early modern English culture that seemed to celebrate individual liberty and restraints on government power.¹⁵⁷

Yet slavery and the law of slavery did come to English-speaking America starting in Barbados early in the seventeenth-century and then spread to the North American continent.¹⁵⁸ A number of scholars have argued that colonies with a Roman law heritage were more receptive to

ultimately form part of the Canadian nation. See ROBIN W. WINKS, *THE BLACKS IN CANADA: A HISTORY* 1-60 (1971).

154. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 34-36, 46-48 (2d ed. 1985).

155. Slavery had essentially ceased to exist and lacked any recognition in English law even before the modern era. As early as the sixteenth century, *villeinage*, the medieval English estate closest to European serfdom, had ceased to exist in English law and society. See 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I*, at 412-32 (2d ed. 1968).

156. Lord Mansfield's opinion in *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772), was perhaps the most famous expression of this point of view. That case was preceded by over 200 years by *Cartwright's Case*, decided in 1569. *Cartwright's Case*, 2 RUSHWORTH 468 (1569), cited in 1 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 9 (Helen Tunnicliff Catterall ed., 1926). In that case, a slave brought to England from Russia was ordered freed, with the deciding opinion holding that "England was too pure an Air for slaves to breath in." *Id.* Blackstone also spent some time attacking various legal rationales and justifications for slavery. Among other things, he discredited the "just war" justification for slavery. See 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND: OF THE RIGHTS OF PERSONS* 411-13 (Stanley Katz ed., 1979).

157. See, e.g., *Cartwright's Case*, *supra* note 156.

158. See generally RICHARD S. DUNN, *SUGAR AND SLAVES: THE RISE OF THE PLANTER CLASS IN THE ENGLISH WEST INDIES, 1624-1713*, at 71-74, 230-34 (1972) (detailing the reliance of English settlers on slave laborers).

manumission than those that inherited the English common law. Both A. Leon Higginbotham and Alan Watson have pointed out that in the North American context, seventeenth-century Dutch New Amsterdam had formal legal structures supporting manumission, complete with a halfway status between slavery and freedom that was absent in the English colonies.¹⁵⁹

But colonial North America is difficult terrain for those who wish to stake out the claim that common law, or common-law-derived, jurisdictions were somehow inhospitable to either manumission or free Negroes. Our best evidence indicates that a substantial portion of the Africans brought to Virginia and other colonies in the seventeenth century were initially treated like indentured servants and freed after a term of servitude.¹⁶⁰ Seventeenth-century North America was an often harsh and hierarchical world where large portions of the white population were in some form of temporarily unfree status as either indentured servants, apprentices, or convicts bound to terms of labor.¹⁶¹ In that world, although distinctions were made between African captives forced into bondage and whites who were also forced to labor, the distinctions, in law and custom, were less sharp than they would become.¹⁶² Indeed, in light of later history, it is significant that the English colonists of seventeenth-century North America tended to justify slavery on religious instead of racial grounds.¹⁶³ Also unlike the codes of the Spanish and Portuguese colonies, the law in English North America did not define membership in different racial categories.¹⁶⁴

By the eighteenth century, colonial statutes would formally recognize slavery, and the law, for the most part, would presume the slave status of Africans and Afro-Americans.¹⁶⁵ Yet even in that atmosphere, access to manumission and the legal status of free Negroes defies easy characterization. There were free people of

159. See WATSON, *supra* note 75, at 110-14.

160. See generally T.H. BREEN & STEPHEN INNES, "MYNE OWNE GROUND": RACE AND FREEDOM ON VIRGINIA'S EASTERN SHORE, 1640-1676 (1980) (examining the different forms of involuntary labor).

161. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 392-95 (1978).

162. See BERLIN, *supra* note 152, at 26-29, 45.

163. WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARDS THE NEGRO 1550-1812, at 91-95 (1968).

164. Thomas Morris notes that the only effort to formally codify who was a Negro in antebellum America is to be found in a Virginia statute of 1849. See MORRIS, *supra* note 149, at 22.

165. *Id.* at 21-28.

African descent in every colony. In South Carolina, free black men formally served in the militia.¹⁶⁶ Interestingly enough, this was not the case in New England.¹⁶⁷ A few free black men probably voted in North Carolina and some northern colonies.¹⁶⁸ Suffrage statutes in the English colonies usually made no specific mention of race as a qualification for voters.¹⁶⁹ In New England, at least some slaves appeared able to take their owners to court to complain of mistreatment.¹⁷⁰

Discrimination also existed throughout English colonies. Statutes forbidding interracial marriage were common.¹⁷¹ In some colonies, free Afro-Americans were forced to provide free labor for public works because they were barred from serving in the militia.¹⁷² Despite this, there was relatively greater legal tolerance in the South, both for manumission and for the presence of free Negroes in the colonial period, than later during the antebellum South of the nineteenth century.

The American Revolution would provide a serious challenge to the system of slavery that had developed in the English colonies. The Revolution greatly expanded the free Negro class and essentially spelled the death knell for slavery in the northern states. This did not occur because slavery was not profitable in the North. It was often quite profitable for individual slave owners, many of whom fought to

166. See Cottrol & Diamond, *supra* note 18, at 326. This reflects a pattern that was common elsewhere in the hemisphere. Over two-thirds of the population in early and mid-nineteenth-century South Carolina were slaves. The willingness of the colonial government of South Carolina to enlist free black men in the militia can be explained in part as a matter of military necessity. The outnumbered white population of the colony needed free Negroes to help control the slave population and also to help fight against potential and actual incursions from Indian groups and the Spanish in Florida. *Id.* at 326 n.67. Early in the eighteenth century a few free black men were even legally enfranchised. *Id.* at 326. Throughout the Americas in locations where whites were a minority, free Negroes, and particularly free mulattos, often occupied the sort of intermediate position between slave and master that nonslaveholding whites would occupy in the antebellum South. For an important examination of slavery in colonial South Carolina, see WOOD, *supra* note 74.

167. See GREENE, *supra* note 153, at 127, 303.

168. *Id.* at 300-03; JORDAN, *supra* note 163, at 126-27.

169. Greene's study indicated that informal discrimination rather than explicit legal prohibitions probably stopped free black men from voting in colonial New England. See GREENE, *supra* note 153, at 300-03.

170. Eighteenth-century Connecticut slave Venture Smith, for example, complained of mistreatment to a Justice of the Peace. See VENTURE SMITH, *A NARRATIVE OF THE LIFE AND ADVENTURES OF VENTURE 14* (J.S. Stewart 1897) (1798).

171. See HIGGINBOTHAM, *supra* note 161, at 41-47.

172. See GREENE, *supra* note 153, at 300-03.

retain their right to human property.¹⁷³ Still, a combination of the liberal sentiments of the postrevolutionary era, coupled with the peripheral role slavery played in the economies of the northern states, permitted a relatively quick and uncomplicated end to the institution.

Even in the South, particularly the upper South, the liberal sentiments prevalent in the late eighteenth century also caused a questioning of the system of slavery.¹⁷⁴ Those sentiments doubtlessly played a role in the enactment of statutes designed to give slaves greater physical protections.¹⁷⁵ Certainly many of the southern statesmen who had played a prominent role in the Revolution and in establishing the new governments were willing to acknowledge, at least on a formal level, the inconsistency of their professed ideals and the practice of slaveholding.¹⁷⁶ Statutes were passed facilitating manumission.¹⁷⁷ Judges proved willing to uphold grants of manumission, even when they were opposed by white parties claiming property interests in the prospective freed slaves.¹⁷⁸ This receptivity to manumission in the South after the Revolution would greatly expand the free Negro class.

Although the history of race relations in the antebellum years of the nineteenth century is a history that took place in both the North and the South, the history that took place in the South probably had a more enduring influence on U.S. sensibilities with respect to both racial hierarchy and racial identity. Briefly put, the antebellum U.S. South was part of a world with two radically conflicting norms. The South was certainly heir to the liberalizing influences of the American Revolution, the Constitution, and even the English common law itself. All of these were premised on high levels of individual autonomy, the protection of rights against the state, and a significant measure of popular participation in government. For white men, these liberal

173. For a general history of abolition in the North, see ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* (1967).

174. See MORRIS, *supra* note 149, at 170-71.

175. Thomas Morris makes an important contribution to the discussion of the increased legal protections for slaves that would be enacted after the American Revolution. He notes that in addition to the development of liberal sentiment, which clearly played a role in increasing legal protection for slaves, cultural change also doubtlessly played an important part. By the late eighteenth century in the United States, slaves were more likely to be Afro-American than African, that is slaves were born in what became the United States and were less culturally alien to whites, which helped the process of enacting protective legislation. See *id.*

176. See Cottrol, *supra* note 10, at 363 n.15.

177. See JORDAN, *supra* note 163, at 346-49.

178. See *id.* at 347.

characteristics would expand in the late eighteenth century and throughout the nineteenth century with the expansion of suffrage rights and the adoption or amendment of state constitutions with formal bills of rights.¹⁷⁹

A peculiar irony of U.S. history is that this process of expanding the liberties of white men occurred simultaneously with an increase in the social and economic importance of slavery to the South.¹⁸⁰ The rise of the cotton kingdom helped bring about a new, more robust defense of slavery.¹⁸¹ Where many southern statesmen in the late eighteenth century had apologetically defended slavery as a temporary evil that must be endured until a better arrangement could be developed, by the 1820s and 1830s, apologists for slavery were prepared to robustly defend the institution.¹⁸² They were also increasingly prepared to offer a racial defense of the institution rooted in an ideology of Negro inferiority and dependency.¹⁸³

In this new atmosphere, the law of the U.S. South would become increasingly hostile to the idea of a free Negro presence and to manumission.¹⁸⁴ The law would become even more hostile to notions of black equality and citizenship. If law in the South in the late eighteenth century was supportive of manumission, it would become at least normatively hostile to the concept in the nineteenth century.¹⁸⁵ Manumissions, of course, continued to take place, particularly in the upper South.¹⁸⁶ Free Negroes would continue to reside in southern states, often despite statutes that placed their legal right to do so in severe jeopardy.¹⁸⁷ Jurists would also continue to note in their opinions that slavery was contrary to both common and natural law and could only be maintained by positive law or statute.¹⁸⁸ But the status of free Afro-Americans would become increasingly tenuous. Statutes would restrict the ability of masters to manumit slaves.¹⁸⁹ In some states, statutes prohibited free blacks from even becoming residents.¹⁹⁰ New

179. See FRIEDMAN, *supra* note 154, at 117-21.

180. See Cottrol, *supra* note 10, at 362-65.

181. See *id.* at 363-64.

182. *Id.* at 364.

183. See *id.* at 364-65.

184. See *id.*

185. EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 406-09 (Vintage Books 1976).

186. *Id.*

187. *Id.*

188. See, e.g., *Bailey v. Poindexter's Ex'r*, 55 Va. (14 Gratt.) 132 (1858).

189. See GENOVESE, *supra* note 185, at 399-400; MORRIS, *supra* note 149, at 376-80.

190. See GENOVESE, *supra* note 185, at 399.

states settled or admitted into the Union in the nineteenth century tended to have a low legal tolerance for free blacks and their small free Afro-American populations.¹⁹¹

It might be convincingly argued that in different places in the South during the seventeenth and eighteenth centuries, some free people of color approached the status of citizen. North Carolina, Tennessee, Maryland, Kentucky, and South Carolina at various points allowed free black men who met the requisite property qualifications to vote.¹⁹² South Carolina enrolled black men in its militia.¹⁹³ In colonial times, some free Negroes from the South were allowed to own weapons.¹⁹⁴

For the most part these rights were progressively lost in the nineteenth century. In 1835, Tennessee became the last southern state to disenfranchise free black men.¹⁹⁵ Almost all the southern states had adopted stringent codes designed to police the free Afro-American population.¹⁹⁶ The status of antebellum southern free Negroes became so bad that modern historians have described them as "slaves without masters."¹⁹⁷

The South's intolerance for the free Negro as citizen would grow during the nineteenth century. It was certainly expressed in the opinion of Justice Taney in *Dred Scott*.¹⁹⁸ That intolerance was also accompanied by the South's determination to increase the legal protection of slavery. The Confederate Constitution is quite important in this regard. Much of the document is taken verbatim from the eighteenth-century United States Constitution. It is, in terms of its guarantees of individual rights, a liberal document like its predecessor.¹⁹⁹ Yet the Confederate Constitution was much more

191. *Id.* at 398-413.

192. *See id.*

193. *See Cottrol & Diamond, supra* note 18, at 326.

194. *Id.* at 325.

195. *See* GENOVESE, *supra* note 185, at 401-02.

196. *See* FRANKLIN & MOSS, *supra* note 21, at 139-41.

197. *See generally* IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* (1974) (describing the life of free blacks in the South from the late 1700s to the 1850s).

198. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403-05 (1856).

199. The Confederate Constitution contained the following individual rights guaranteed in the United States Constitution: the prohibition against the bill of attainder and ex post facto law; the prohibition against title of nobility; the prohibition against the establishment of religion and restriction on free exercise of religion; the protection of freedom of press, peaceable assembly, and petition; the right to bear arms; the prohibition on quartering of troops; the protection against unreasonable search and seizure and the requirement that warrants have probable cause; the grand jury requirement, the double

absolute in its legal protection of slavery. It provided an explicit right for slaveholders in one state to bring their slaves into another state without the impairment of their rights as slaveholders.²⁰⁰ It also required that any new states admitted into the Confederacy must accept and protect the institution of slavery—there were to be no free states in the Confederacy.²⁰¹ Most importantly, the Confederate Constitution specified that “No . . . law denying or impa[i]ring the right of property in [N]egro slaves shall be passed.”²⁰² In many ways the Confederate Constitution can stand as the highest expression of the South’s law with respect to bondage and freedom. That document’s adoption of the liberal individual rights provisions of the United States Constitution coupled with its guarantee of the perpetual rights of slave owners highlights the contradiction of slavery in liberal society, a contradiction that defined the society that was the slaveholding South. That contradiction, that dissonance, increasingly found its expression in hostility to the presence of free Afro-Americans.

The increasing hostility of the law of the South to a free Negro presence and to the possibility of free Negro citizenship reflected both the ideological challenge that free blacks represented to southern slavery and the marginal position of the free Negro within the South’s world of plantation slavery. In a world where slavery was increasingly justified on the racial grounds of both the inherent inferiority and the dependent nature of blacks, the presence of free, self-sufficient blacks provided a stark and unwelcome contradiction to the reigning ideology.²⁰³

There were also important demographic reasons for the marginal status of southern free Negroes. The antebellum South was unique in the Americas. Its economy was tied to a system of industrial slavery and large-scale plantation agriculture. Yet unlike other such venues in the New World, the majority of its population consisted of nonslaveholding whites.²⁰⁴ Those nonslaveholding whites performed

jeopardy prohibition, the protection against self-incrimination, and the due process requirements; the right to a speedy trial as well as the jury requirement in criminal trials; the right to a jury trials in civil cases; and the prohibition on excessive bail, excessive fines, and cruel and unusual punishment. CONFEDERATE CONST. art. I, § 9, cls. 4, 11-19, reprinted in CHARLES ROBERT LEE, JR., *THE CONFEDERATE CONSTITUTIONS* 171-200 (1963).

200. *Id.* art. IV, § 2, cl. 1.

201. *Id.* art. IV, § 3, cl. 1.

202. *Id.* art. I, § 9, cl. 4 (first alteration in original).

203. See Cottrol, *supra* note 10, at 362-65.

204. See KLEIN, *supra* note 59, at 44-45.

critical tasks that held the system of plantation slavery together.²⁰⁵ They policed the slave population.²⁰⁶ They ran the truck farms, the steamships, the coaches, and the shops. They manned the sheriffs' posses, the militia, and the army. They acted as plantation managers and overseers. They were the intermediate class between master and slave. This abundant free white population meant that free Negroes were not needed to fill the kind of intermediate position between master and slave that was often unoccupied in other New World plantation societies.

That Afro-Americans became a group uniquely apart from others was the great contradiction in U.S. liberalism, but it was also a direct result of it. The antebellum U.S. political culture was about the business of expanding the rights of its large free white population, but it also was about the business of expanding slavery. This could not be done without an appeal to race that set blacks uniquely apart from all others. Racial distinctions would take on a singularly rigid character. The U.S. law of slavery was important, but not because it abetted a system of racial hierarchy and racial subordination. Racial hierarchy and racial subordination existed throughout the multiracial societies of the Americas. The U.S. law of slavery went further. It reified the notion that white and black were hermetically sealed, mutually exclusive categories. This concept would be strengthened in U.S. law. More importantly, it would come to be an enduring feature of U.S. culture.

B. Brazil

Before moving on to a discussion of Brazilian slavery, it might be instructive to briefly present slavery in ancient Rome as the ideal that might be contrasted with the peculiar institution of the antebellum U.S. South.²⁰⁷ This contrast might further assist us in understanding why the U.S. system of slavery played such an important role in constructing a castelike culture of racial identity and racial classification. Such a contrast can also help us understand the somewhat different developments in Brazil and other parts of Latin America.

205. Robert J. Cottrol, *Outlawing Outcasts: Comparative Perspectives on the Differing Functions of the Criminal Law of Slavery in the Americas*, 18 CARDOZO L. REV. 717, 731, 744-45 (1996).

206. *Id.*

207. See Max Weber's discussion of the use of "ideal types" as a vehicle for clarifying comparative social research in 1 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 20-22 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al., trans., Univ. of Cal. Press 1978).

Generalizing about Roman slavery is even more hazardous than generalizing about slavery in the United States or Latin America. Roman slavery under both the Republic and the Empire lasted even longer than the period between 1492 and the present, the era of European and African contact with the Americas.²⁰⁸ Roman slavery encompassed household slavery and industrial slavery, and was found in every corner of the Empire.²⁰⁹ Before Constantine's imposition of Christianity on the Empire, the Roman slave code could encompass both incredible cruelty and incredible generosity on the slave. A slave favored by his master could be freed and even elevated to the rank of Roman citizen.²¹⁰ And yet the Roman code called for the execution of all slaves in the household if one slave killed the master.²¹¹ This was done regardless of the guilt or innocence of the other slaves.²¹²

What is important for our purposes is that Roman slavery did not require a theoretical justification rooted in the putative inferiority of slaves or of the peoples who were enslaved. In ancient Rome, slavery was a matter of personal misfortune, not group inferiority.²¹³ Indeed in one important respect the ancient Romans were willing to acknowledge the cultural equality, or even superiority, of some of those they held in bondage.²¹⁴ It was not uncommon in wealthy Roman households for Greek slaves to act as the tutors of children. This might be contrasted to the antebellum South where some states made it a criminal offense to teach slaves to read.²¹⁵ The Roman belief in Greek cultural superiority did not prevent the enslavement of Greeks—even well-educated Greeks.

The Roman ability to enslave those whom they acknowledged as their equals, or even perhaps their superiors, stood in marked contrast to the antebellum South. The Romans were able to do so in part because their society was comfortable with inequality. The Roman Empire was a strongly hierarchical society with a large slave population.²¹⁶ Although Roman law recognized that subject peoples,

208. Alan Watson notes Roman slavery as early as 200 B.C. See ALAN WATSON, *ROMAN SLAVE LAW* 2 (1987). It would still be regulated in the Justinian Digests more than 700 years later in 534 A.D. See *id.* at 6.

209. See *id.*

210. *Id.* at 23-34.

211. See WATSON, *supra* note 79, at 102-04.

212. *Id.*

213. See WATSON, *supra* note 208, at 3-4.

214. *Id.*

215. See MORRIS, *supra* note 149, at 347-48.

216. RAMSAY MACMULLEN, *ROMAN SOCIAL RELATIONS: 50 B.C. TO A.D. 284*, at 88-94 (1974).

particularly slaves, sought to improve their status and even allowed for such a possibility, the idea that society would remain a pyramid of unequal peoples was not challenged.²¹⁷ In a society where a majority of peoples were legally unequal and officially subject to the domination of others, slavery required no elaborate theories of difference and inferiority. It was in the United States where slavery was the exception, where the majority of the population was nominally, and more importantly, normatively equal that the institution required elaborate justification. In the free United States, slaves had to be people of a different order.

In many ways Brazilian slavery, and indeed slavery in other parts of Latin America, represented a midpoint between the two ideal types represented by ancient Rome and the U.S. South. Like Rome, Brazil was part of a large Empire where, at least initially, a small class of citizens ruled over a much larger class of subject peoples, many of whom were slaves. Unlike Rome, and like the U.S. South, Brazilian slavery was based on race. The Portuguese, after a relatively brief attempt at enslaving the native Indian populations of Brazil in the sixteenth century, would reserve formal slave status for Africans and Afro-Brazilians.²¹⁸ A critical distinction between Brazil and what would become the United States was the relative scarcity of white settlers in Brazil.²¹⁹ Few Portuguese settlers came to the colony. Fewer still came with families intending to establish a new society in the New World. Whites would remain a distinct minority throughout the colonial period.²²⁰

Slavery would be practiced, and prove lucrative, throughout the Portuguese colony. The large sugar plantations of northeastern Brazil would create great wealth for planters.²²¹ It would also draw large numbers of Africans to the regions, many of whom perished in the harsh conditions that prevailed on the sugar plantations. Nonetheless, the large numbers of Africans brought to the Northeast would leave an enduring African presence in the region. Even today, northeastern Brazil, particularly the state of Bahia, is one of the great centers of African culture in the Americas. In the eighteenth century, the use of slaves in the gold mines of what is now the state of Minas Gerais

217. *Id.* at 97-101.

218. Eunice Prudente notes that the Jesuits favored the substitution of African slaves for Indians. See PRUDENTE, *supra* note 9, at 42-43.

219. THOMAS W. MERRICK & DOUGLAS H. GRAHAM, POPULATION AND ECONOMIC DEVELOPMENT IN BRAZIL: 1800 TO THE PRESENT 29-30 (1979).

220. *Id.*

221. *Id.* at 11-12.

(Great Mines) played an important role in the development of the eastern central region of Brazil.²²² Slaves would also be employed extensively throughout the nineteenth century in the cultivation of coffee, particularly in what is now the modern state of São Paulo.²²³

Our principal concern here is the Brazilian law of slavery in the nineteenth century. How might we characterize, in broad outline, the reaction of Brazilian law to the contradictory demands of a dynamic, race-based system of slavery, the increasing influence of liberal norms within Brazilian society, and the increasing size of the free Afro-Brazilian population during the course of the nineteenth century?

Brazil, through Portugal, had inherited much of the latter Roman law of slavery.²²⁴ The slave under Portuguese law was both chattel for purposes of the commercial codes and person for purposes of the criminal codes.²²⁵ As early as 1445, Portugal authorized the importation of Africans.²²⁶ Emperor Dom Joao III officially opened the African slave trade to Brazil around 1530.²²⁷ Theoretically, the slave enjoyed the protection of Portuguese law both in Portugal and Brazil. But the harsh conditions, particularly on the sugar plantations of northeastern Brazil, made the law's protection largely a dead letter.

The liberal thinking that inspired revolutionary movements throughout the Western world seemed to have posed less of a problem for Brazilian slavery than was the case elsewhere in the hemisphere. The period during the late eighteenth and early nineteenth centuries was the occasion for a number of rebellions by Brazilian elites against Portuguese rule.²²⁸ In so far as liberal thought played a role in these rebellions, it was a fairly narrow strain of liberal thought, principally a pro-free-trade, antimercantalist view.²²⁹ The movements against the Portuguese Crown did not seem to inspire any significant questioning of slavery or challenging of the significant inequalities in colonial Brazilian society.²³⁰ When Brazil did achieve independence in 1822, it

222. See LAIRD W. BERGAD, *SLAVERY AND THE DEMOGRAPHIC AND ECONOMIC HISTORY OF MINAS GERAIS, BRAZIL, 1720-1888* (1999).

223. See VIOTTI DA COSTA, *supra* note 111, at 19-64.

224. See WATSON, *supra* note 75, at 91-94.

225. See PRUDENTE, *supra* note 9, at 32.

226. See SAUNDERS, *supra* note 83, at 4-11.

227. *Id.* at 7, 23.

228. See PRUDENTE, *supra* note 9, at 25-30.

229. *Id.*

230. Prudente notes that a 1798 rebellion in Bahia was an exception to this pattern. *Id.* at 48-50. According to her research that rebellion did have a significant antislavery element and also reached out to the free Afro-Brazilian population as allies in the struggle. *Id.* at 48-50.

would do so with the colonial social structure largely intact.²³¹ At the top of that structure was the Emperor Dom Pedro I and a relatively small group of wealthy whites, many of whom were slaveholders.²³² Further down were nonslaveholding whites, free mulattos, and free blacks.²³³ At the bottom was the large population of slaves, who produced the wealth of the new country in the sugar fields of the Northeast and the mines of Minas Gerais. At its beginning, Brazil was a nation even less apologetic about slavery than others, including the United States. It would resist international pressure to end the slave trade until 1850.²³⁴ It would continue that trade even after it had formally made it illegal.²³⁵

If Brazilian slavery was physically harsh, economically profitable, and not seriously under abolitionist attack at the beginning of the nineteenth century, it was nonetheless not hostile to manumission or the prospect of citizenship for free Afro-Brazilians, particularly mulattos. Unlike the United States, free people of color had always constituted a significant portion of the Brazilian free population.²³⁶ The law of the newly independent Brazilian Empire would continue the Portuguese legal tradition of facilitating manumission and recognizing the citizenship of free Afro-Brazilians.²³⁷ As might be expected, there was often a significant gap between the law in theory and in practice with respect to manumissions. Brazilian law, for example, preserved the Roman law doctrine that the children of masters and slave women were to be freed at birth.²³⁸ A number of masters simply disregarded this rule, keeping their children enslaved.²³⁹ The doctrine's importance as a legal norm nonetheless should not be

231. See FREYRE, *supra* note 61, at xxxv.

232. See *id.* at xxv, 172-73.

233. See *id.* at 230-32.

234. See *id.* at xxxvi.

235. See TOPLIN, *supra* note 111, at 39-40.

236. See BERGAD, *supra* note 222, at 107-22.

237. Prudente makes the point that, with respect to manumission and other aspects of the law of slavery, there was a lack of systematic codification of the law of slavery. See PRUDENTE, *supra* note 9, at 85. Instead, nineteenth-century Brazilian jurists were forced to borrow from the slave codes of other civil law jurisdictions relying on interpretations of those codes as they were made by historians and juriconsults. See *id.* at 85. For a discussion of the adoption of postindependence legislation facilitating self-purchase by Brazilian slaves, see Keila Grinberg, *O Fiador Dos Brasileiros: Cidadania, Escravidão E Direito Civil No Tempo De Antonio Pereira Rebouças 155-57* (2000) (tese apresentando ao programa de pós-graduação em história da Universidade Federal Fluminense, como requisito para a obtenção do grau de Doutor) (unpublished doctorate degree dissertation, Federal University of Rio de Janeiro) (on file with author).

238. See WATSON, *supra* note 75, at 99.

239. See PRUDENTE, *supra* note 9, at 88-89.

overlooked, and it is significant that U.S. law did not recognize a similar doctrine.

The standard form for the manumission of slaves in Brazil was the *Alforria*.²⁴⁰ The *Alforria* was given entirely at the discretion of the slave owner,²⁴¹ and was often accompanied by conditions. Many slaves granted the *Alforria* were often given conditional manumissions that could be revoked by former masters for such transgressions as ingratitude.²⁴² Individuals conditionally manumitted were known as *libertos*. Children of *libertos* were considered full-fledged free persons and citizens.²⁴³

As the nineteenth century unfolded, Brazilian slavery would come under increasing pressure. International pressure forced Brazil to abandon the African slave trade in 1850.²⁴⁴ With the intensification of abolitionist pressures after the end of the U.S. Civil War, Brazil would begin a process that gradually abolished slavery.²⁴⁵ In 1871, the law of the free womb proclaimed that children of slave mothers born from September 28, 1871 forward were to be free.²⁴⁶ Slavery would finally be abolished with the dissolution of the Brazilian Empire and the formation of the Republic in 1888.²⁴⁷

240. *Id.* at 93.

241. *Id.* at 93-94; see also ALAÔR EDUARDO SCISÍNIO, DICIONÁRIO DA ESCRAVIDÃO 21-22 (1997).

242. See PRUDENTE, *supra* note 9, at 95-97.

243. *Id.* Prudente notes that the 1824 Constitution made citizens of *libertos* born in Brazil, but also prohibited them from voting. Their children, *ingênuos*, were also citizens, but with no restrictions on their exercise of the franchise. For a discussion of the debate over the status of *libertos* after independence, see Grinberg, *supra* note 237, at 127-62.

244. This was accomplished by a statute proclaimed by Emperor Dom Pedro I. See Lei No. 581, de 4 de setembro de 1850, available at <http://www.icmc.sc.usp.br/ambiente/saocarlos/docs/eusebio.html> (last visited Nov. 1, 2001). Philip Curtin indicates that the last slave ships came to Brazil in the 1850s. See CURTIN, *supra* note 60, at 269; THOMAS, *supra* note 86, at 744-45. The last Africans known to have been brought to the Americas as slaves were brought to Cuba in 1870, five years after the end of the U.S. Civil War. See THOMAS, *supra* note 86, at 784.

245. For two treatments of abolition in Brazil, see CONRAD, *supra* note 109, and TOPLIN, *supra* note 111.

246. Lei Ventre Livre [Law of the Free Womb], Lei No 2040, de 28 de setembro de 1871, available at <http://www.nethistoria.com/docs/100/docs19.shtml> (last visited Nov. 1, 2001). By my calculations, the law of the free womb could have kept some individuals in bondage until the 1930s. Under the statute, a child born of a slave mother would owe a debt of service to his mother's master until the age of twenty-one. *Id.* § 1. Thus if a girl was born on September 27, 1871, and had a child when she was forty on September 27, 1911, that hypothetical child would have owed a debt of service to the mother's master (or his heirs) until the year 1932. Of course the final abolition of slavery in 1888 prevented this hypothetical situation from occurring. For details on Lei Rio Branco, see PRUDENTE, *supra* note 9, at 69-71, and SCISÍNIO, *supra* note 241 at 199-201.

247. See FREYRE, *supra* note 61, at xxxvii.

From the point of view of subsequent race relations, what was most important about slavery in nineteenth-century Brazil was that Brazil could be at once a slave society and yet be comfortable with a significant and growing population of free Afro-Brazilians. If the law in the antebellum U.S. South had to increasingly make free Negroes a legally suspect class with a constantly diminishing set of rights, such was not the case in Brazil. The system of slavery in Brazil did not consider the free Negro to be a threat to the social equilibria. This was, in part, a carryover from the colonial era when a relative scarcity of whites gave the free Afro-Brazilian an important role within Brazilian society. It was also, in part, because that scarcity promoted a stronger degree of color differentiation among Afro-Brazilians than was common in U.S. society. And it was also because the Brazilian culture was comfortable with status and hierarchy in a way that was not true in the United States. In many ways it was precisely because Brazil was less liberal and less apologetic about slavery that it was able to be more tolerant of a large population of free people of color.

C. *Spanish America*

Like Brazil, colonial Colombia and Venezuela had a system of slavery that stood midway between the ideal represented by ancient Rome and the antebellum U.S. South. Colombia, Venezuela, and the rest of the Spanish Empire in the Americas were like the U.S. South in that they had a system of race-based slavery. Slavery was reserved for Africans and their descendants.²⁴⁸ That was a decision the Spanish made much earlier and much more explicitly than did the English in North America; indeed that decision had been made in Spain even before the Spanish exploration of the Americas.²⁴⁹ The Spanish would also bring early on a well-developed notion of a color caste system.²⁵⁰

Unlike the North Americans of the antebellum South, however, Spanish colonial society was quite comfortable with manumission and the rise of free people of color to the status of citizen. Spanish law, starting with its fourteenth-century reception of Roman law, *Las Siete Partidas*, was probably the most favorable to manumission of any body of slave law in the Americas.²⁵¹ In Spanish colonies in the Americas,

248. See ROUT, *supra* note 87, at 22-24.

249. See *id.*

250. See *id.* at 126-33.

251. *Las Siete Partidas* declared slavery to be contrary to the law of nature. See Lau, *supra* note 84, at 456. It nonetheless recognized that slavery would perhaps inevitably occur as a result of warfare. See 3 LAS SIETE PARTIDAS, partida fourth, tit. xxi, law 1 (Lope de Vega

slaves had the legal right to take their owners to court, have the court declare a fixed price for their self-purchase, and then have the court enforce the manumission agreement between the master and slave.²⁵² Research indicates that slaves in Colombia and Venezuela were frequently successful in having the courts enforce such agreements.²⁵³ As in Brazil, economic conditions, coupled with a relatively small white population, favored the growth of a substantial free Afro-American class in both Colombia and Venezuela.²⁵⁴ Unlike the Brazilian case, the law in colonial Venezuela appears to have done away with the *liberto* or midway status between slavery and freedom.²⁵⁵

Colonial Colombia and Venezuela provided legal protection for manumission and accepted a large free Afro-American population.²⁵⁶ It also provided a cultural acceptance of, and legal protection for, a certain level of racial mobility. In part because of the relatively small white population and also as a way of strengthening the loyalties of free people of color, the possibilities of purchasing whiteness, getting in effect a patent of whiteness, was open to successful free people of color.²⁵⁷ The multitiered layer of racial classifications within the Spanish Empire also contributed to a culture of racial mobility even for those who did not purchase patents of whiteness.²⁵⁸

1972). It also spoke of slavery possibly being justified when it resulted from warfare against those who were enemies of the faith. See *id.* *Las Siete Partidas* also specified that neither Jews nor Moors could hold Christians as slaves. See *id.* at partida fourth, tit. xxi, law 8. It made no racial distinctions with respect to who could or could not be enslaved. *Las Siete Partidas* expressed support for manumission and specified ways that masters could manumit slaves. *Id.* at partida fourth, tit. xxi. The late Frederick Bowser, a specialist on Afro-Americans in colonial Spanish America, cautioned us in using *Las Siete Partidas*, saying it must be regarded as a compilation of legal and moral principles that informed colonial legislation, but was not a body of living law. See Frederick P. Bowser, *The African in Colonial Spanish America: Reflections on Research Achievements and Priorities*, *LATIN AM. RES. REV.*, Spring 1972, at 77, 78.

252. See WATSON, *supra* note 75, at 55.

253. William Sharp makes this point particularly with respect to the Colombian Chocó region in the eighteenth century. See William F. Sharp, *Manumission, Libres, and Black Resistance: The Colombian Chocó 1680-1810*, in *SLAVERY AND RACE RELATIONS*, *supra* note 68, at 89, 94-96. Located in the western part of Colombia, it was the site of extensive gold mining. Manumission litigation frequently centered around the question of whether slaves attempted to purchase their freedom through the use of gold stolen from their masters. Sharp indicates slaves frequently won these cases. *Id.*

254. John V. Lombardi, *The Abolition of Slavery in Venezuela: A Nonevent*, in *SLAVERY AND RACE RELATIONS*, *supra* note 68, at 228, 238, 244 n.4.

255. Norman A. Meiklejohn, *The Implementation of Slave Legislation in Eighteenth-Century New Granada*, in *SLAVERY AND RACE RELATIONS*, *supra* note 68, at 176, 182-84.

256. See *id.* at 182.

257. See Lau, *supra* note 84, at 418; Bowser, *supra* note 251, at 86.

258. See Lau, *supra* note 84, at 420-21.

Even the highly stratified societies in Spain's American Empire would not prove immune to many of the liberalizing influences that overtook the Western World toward the end of the eighteenth century. As would occur elsewhere in the American hemisphere, Spanish slave codes were rewritten in an effort to provide better regulation of slaves and, at least in theory, greater protection from the cruelties of masters than the *Las Siete Partidas* and various local slave codes provided.²⁵⁹

The viceroyalty of New Granada, out of which would eventually come the modern nations of Colombia and Venezuela, would enter the nineteenth century with a declining slave population. Even though slave owners in the Spanish colony had been successful in liberalizing the slave trade and relaxing the colonial *asiento* system which gave Crown monopolies to slave traders, declining demand for slaves, coupled with a rise in manumissions, had significantly reduced the proportion of slaves in the population.²⁶⁰ The system of slavery in New Granada would be dealt a fatal blow by the Simon Bolívar-led wars of independence.²⁶¹ The participation of Afro-Americans in the armies of Simon Bolívar led to large-scale manumissions.²⁶² The new nation of Gran Colombia that came out of the struggle for independence had a gradual emancipation provision in its Constitution.²⁶³ When Venezuela and Colombia became separate nations, both kept the gradual emancipation provision in their constitutions.²⁶⁴ Colombia and

259. See, e.g., JAVIER MALAGÓN BARCELÓ, *CÓDIGO NEGRO CAROLINO* (1784) (J.A. Caro Alvarez ed., 1974); Pedro Vicente Sosa Llanos, *Influencia del Código Negro de 1789 en la Insurrección de los Negros de Coro*, in 78 *BOLETÍN DE LA ACADEMIA NACIONAL DE LA HISTORIA*, Apr.-June 1995, at 111.

260. See, e.g., William F. Sharp, *The Profitability of Slavery in the Colombian Chocó, 1680-1810*, 55 *HISP. AM. HIST. REV.* 468, 471-75 (1975); see also Lombardi, *supra* note 254, at 228-30. Historian William F. Sharp also indicates that running away played a major role in reducing the number of slaves in the Spanish colonies in the Americas. See Sharp, *supra* note 253, at 100-01. Sharp's research, which focused on the gold mining Chocó region of western Colombia, indicated that *cimarrones*, or runaway communities, were a major factor in reducing the slave population in that region. *Id.* The situation with runaways in many Spanish colonies was quite different from the history in the United States. With difficult terrain and small white population, *cimarrons* were often able to successfully run away and maintain their independence. *Id.* Frequently *cimarron* communities were often places for the reestablishment or reconstitution of African cultures in isolated New World venues.

261. See JOHN V. LOMBARDI, *THE DECLINE AND ABOLITION OF NEGRO SLAVERY IN VENEZUELA 1820-1854*, at 46 (1971).

262. See *id.* at 46-53.

263. See ROUT, *supra* note 87, at 237.

264. See LOMBARDI, *supra* note 261, at 46-53.

Venezuela would finally do away with slavery within four decades of independence.²⁶⁵

There is a tremendous irony in the history of abolition in the former Spanish colonies of Latin America. Their revolutions for independence were influenced by the U.S. example. They would adopt, at least nominally, the liberal norms of democratic governance and human equality expressed in the U.S. Declaration of Independence and the United States Constitution. Those societies, as was the case with Colombia and Venezuela, did even better by liberal standards by starting the process of abolishing slavery as part of the process of constructing their new nations. The irony, of course, is that the former Spanish colonies, the new nations of Latin America, would remain societies of deep and persisting inequalities. Yet despite this, they would not have the sharp dissonance that plagued the U.S. South, the contrast of slavery in a society that celebrated freedom. This would allow Colombia, Venezuela, and the other Spanish-speaking nations of the hemisphere to develop as cultures with often significant racial stratifications and prejudices, but also societies where Afro-Americans were somewhat less of a people apart compared with the United States.

V. FROM EMANCIPATION TO EQUALITY, THE UNFINISHED JOURNEY

The law of slavery and emancipation left differing legacies of racial categorization, racial exclusion, and racial hierarchy to the nations of the Americas. These varied legacies would in turn have profound influences on the official and unofficial racial policies of different American nations. These in turn would help shape the struggle for equal rights. This process would often occur in unintended, unforeseeable, indeed in even ironic ways. The postemancipation history of Afro-Americans in the Western Hemisphere is a complex, multidimensional history of which the legal history of racial discrimination and racial remedy has played a crucial part.

Certainly the aftermath of slavery in the United States provides a clear example of continuity between patterns of legal exclusion developed during slavery and the patterns of legal discrimination that would be adopted after slavery. If the Civil War Amendments and the Reconstruction-era civil rights statutes enacted immediately after

265. See *id.* at 135-42; ROUT, *supra* note 87, at 240. For a discussion of the end of slavery in Colombia, see Jorge Castellanos, *The Failure of the Manumission Juntas in the Colombian Province of Popayán, 1821-1851*, 14 MICH. ACADEMICIAN 427 (1982).

emancipation were meant to provide something of a break with the total exclusion of blacks from the ranks of citizens that had been proclaimed by Justice Taney in *Dred Scott* or the Confederate Constitution during the Civil War, the southern states, by the beginning of the twentieth century, were able to reassert much of the antebellum pattern of total exclusion. With the acquiescence of the federal government, including the constitutional imprimatur of the nation's highest tribunal, southern, as well as other states, were able to impose an elaborate system of petty apartheid known as Jim Crow.²⁶⁶ I think that a fair reading of southern history would force us to disagree with the late C. Vann Woodward's view, expressed in *The Strange Career of Jim Crow*, that Jim Crow, when it began at the turn of the last century, was something of a break with previous patterns in southern history.²⁶⁷ Instead it should be seen as a continuation of patterns developed before the Civil War, patterns that dictated that the Afro-American must be subordinate and clearly unequal, and that the free Afro-American should be an officially unwelcome exception. Jim Crow was simply a new manifestation of an established principle in southern law and southern culture. Likewise, legislative measures taken at the end of the nineteenth and the beginning of the twentieth century to disenfranchise black voters should also be seen as a continuation of the antebellum southern doctrine that the free Negro could not be a citizen. These measures also received the acquiescence of the Supreme Court, despite the demands of the Fourteenth and Fifteenth Amendments.²⁶⁸

If Afro-Americans in the southern United States experienced a legal regime rooted in the exclusions of the antebellum era, discussing race, hierarchy, and the law in Latin America is somewhat more complex. Long before the final emancipation in Brazil, Colombia, and Venezuela, the majority of people of African descent in those nations were free and regarded as citizens.²⁶⁹ Constitutional provisions in those nations proclaimed the equality of citizens before the law, as was of course the case with the United States after the Civil War. In none of the three nations was there the kind of sharp regional divide with respect to race, slavery, and emancipation that existed in the United States. While emancipation in the United States was the result of regional conflict and profoundly different views with respect to not only issues of slavery, but also issues of race and citizenship in

266. See WOODWARD, *supra* note 16, at 64-67.

267. *Id.* at 13-31.

268. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896).

269. See ROUT, *supra* note 87, at 238; TOPLIN, *supra* note 111, at 20-24.

different regions,²⁷⁰ this was not the case with respect to the three Latin American nations we are examining. In each of the three nations, emancipation was a national decision, in part reflecting the national triumph of at least a nominal liberal-egalitarian sentiment, and also in part reflecting that slavery had come to have a somewhat tenuous viability. It should be added that the tenuous viability was partially brought about by the large free Afro-American populations in the three nations at the time of emancipation. Brazil, Colombia, and Venezuela would enter the twentieth century as societies with relatively little in the way of formal legal discrimination against their Afro-American populations. They would also enter the twentieth century as societies highly stratified by race and societies with significant degrees of color prejudice.²⁷¹ Those prejudices and stratifications would in turn be augmented by the growth of scientific racism in the latter part of the nineteenth century and the early part of the twentieth.

Two racial ideas would have a particularly important influence on one area of law and official policy in the three nations. The first was the Darwinian notion that inferior races would lose in the competition with superior races and ultimately would die out.²⁷² The second was that the relative underdevelopment in Latin America could be attributed to the large African and Indian elements in the region and the relatively small European presence.²⁷³ Manoel de Oliveira Lima, who had been part of the Brazilian diplomatic delegation to the United States, expressed this view when he argued that Brazil was underdeveloped compared to the United States because the Latin colonizers were more backward than the English and because of the large degree of miscegenation between blacks and whites.²⁷⁴

In the early part of the twentieth century throughout Latin America, the related ideas that progress was linked to a large white population and that inferior races would disappear in competition with the superior white race led to official policies designed to "whiten" the

270. For two discussions that argue that the U.S. North, significant racism notwithstanding, was significantly more egalitarian than the South, see Robert J. Cottrol, *The Thirteenth Amendment and the North's Overlooked Egalitarian Heritage*, 11 NAT'L BLACK L.J. 198, 201-06 (1989), and Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 415-21 (1986).

271. See, e.g., Winthrop R. Wright, *Elitist Attitudes Toward Race in Twentieth-Century Venezuela*, in *SLAVERY AND RACE RELATIONS*, *supra* note 68, at 325 (discussing official policies in Venezuela expressing prejudice).

272. WINTHROP R. WRIGHT, *Café con Leche: Race, Class, and National Image in Venezuela* 52-54 (1990).

273. *Id.* at 53-54.

274. See PRUDENTE, *supra* note 9, at 146.

populations of different Latin American nations. Called "*blanquamiento*" in the Spanish-speaking nations and "*branquamento*" in Brazil, the idea was to encourage the progressive whitening of national populations.²⁷⁵ The first step in such a policy was restrictive immigration laws designed first, to encourage European immigration and second, to prohibit or severely discourage the immigration of peoples of African, Asian, and Indian ancestry.²⁷⁶ As early as the 1850s, Brazil had taken positive steps to encourage European immigration. A statute passed that year provided generous land grants to immigrants designed to encourage more European immigration.²⁷⁷ The same statute also denied land title to residents of Quilimbos, whose land had been occupied by the descendants of runaway slaves, some of whom had been free for generations.²⁷⁸

After the dissolution of the Brazilian Empire in 1889, the law's preference for white immigrants would become more explicit. One of the first enactments of the new republic was immigration decree No. 528 promulgated on June 28, 1890 by provisional president Manoel Deodoro da Foneseca.²⁷⁹ His decree excluded all those with criminal backgrounds from immigrating to Brazil.²⁸⁰ It also excluded all members of the indigenous populations of Asia and Africa.²⁸¹ However, one of the decree provisions was relaxed two years later, when a statute passed in October, 1892, permitted the entry of Chinese and Japanese immigrants.²⁸²

Brazilian immigration law would be at its most restrictive under the quasi-fascist government of Getulio Vargas. In 1934, the new constitution would explicitly limit immigration to whites.²⁸³ African immigration was explicitly forbidden, and Asians were limited to five percent of the total number of immigrants in a given year.²⁸⁴ The Brazilian constitution also went on to prohibit settlement by blacks or Asians regardless of their country of origins, a measure presumably designed to curtail immigration from other Latin American nations.²⁸⁵ Provisions in the Brazilian constitution designed to allow the

275. See WRIGHT, *supra* note 272, at 67-68.

276. See *id.* at 59; WADE, *supra* note 67, at 11-12.

277. See PRUDENTE, *supra* note 9, at 129-131.

278. *Id.*

279. *Id.* at 151-52.

280. *Id.* at 152.

281. *Id.* at 152-53.

282. *Id.* at 153-54.

283. *Id.* at 155-56.

284. *Id.* at 156.

285. *Id.*

government to prevent nonwhite immigrants from entering the country were reenacted in the 1946 Constitution and also in a 1969 decree by the military government.²⁸⁵

Both Colombia and Venezuela would also enact similar legislation with the aim of encouraging white immigration and preventing the immigration of blacks, Asians, and Indians.²⁸⁷ Immigration policy was to be one part of the process of *blanquamiento*. Another part of that process would have to do with racial definition. If both the legal and social histories of slavery had left what appears, at least to North American eyes, a certain ambiguity with respect to racial definition, the desire to "whiten" national populations or "better the race," as it was frequently termed, added further to the ambiguity of racial classification. Here again, population dynamics played a crucial role. Whites in the United States, historically nearly a ninety percent majority, were not concerned with "whitening" the population. The expressed concerns of white North Americans at the beginning of the twentieth century were in maintaining a white majority and preserving the racial purity of the U.S. white population. These concerns would lead to the strengthening of the hypo-descent rule in U.S. law.²⁸⁸ In Brazil, Colombia, and Venezuela, the large Afro-American and Indian populations made the kind of whitening that many social thinkers hoped for impossible. Although Brazil would receive large-scale European and Japanese immigration, particularly in its southern states, the overwhelmingly large number of people of African and Indian descent would continue to remain a significant element of the population throughout the nation and even continue as majorities in some regions like the northeast.²⁸⁹ Colombia and Venezuela would receive less European immigration than Brazil.²⁹⁰ The relatively small proportion of whites in the populations of all three nations probably strengthened the tendency to make distinctions between blacks and people of mixed race. The policy of *blanquamiento* and the demographic reality of small white populations also led to a pattern of racial classification that was at sharp variance with the practice in the United States.²⁹¹ In all three nations there would be persons with

286. *Id.* at 159-61.

287. See WADE, *supra* note 67, at 11-12, 15; WRIGHT, *supra* note 272, at 60-64. Wright notes that despite the law's efforts, Venezuela nonetheless did have a significant black immigration early in the century. WRIGHT, *supra* note 272, at 61-66.

288. See, e.g., *State v. Treadaway*, 52 So. 500, 504-07 (1910).

289. See MERRICK & GRAHAM, *supra* note 219, at 90-96.

290. See WRIGHT, *supra* note 272, at 59.

291. See WADE, *supra* note 67, at 359.

known and acknowledged African ancestry who would be classified as white.²⁹² If U.S. law dictated that any traceable African ancestry made an individual black, then in much of Latin America demography and national aspiration meant that some white ancestry, coupled perhaps with social position, could make an individual white despite some Afro-American ancestry.

Racial classification and racial hierarchy would get even more complex in Latin America with the unfolding of the twentieth century. Latin American elites would begin the century with a heritage of racial stratification, the legacy of Afro-American slavery, and systems of exploitation and exclusion of the native Indian populations. That heritage would be augmented by racist and Darwinist doctrines that prevailed throughout the Western world before the First World War. Yet Latin America would also be influenced by a countervailing strain of racial and nationalist thinking, particularly after World War I. By the 1920s, a number of Latin American intellectuals began seeing the Afro-American and Indian elements of their national populations less as embarrassments to be explained away, and more as distinctive parts of their national identities. In societies with predominately Indian populations, like Peru and Mexico, *indigenismo* came to be celebrated as a vital element of the national culture.²⁹³ In Brazil, a new strain of nationalistic intellectuals, most famous among them sociologist Gilberto Freyre, began to celebrate in their writings the Afro-Brazilian contribution to the nation's history.²⁹⁴

This new celebration of the Afro-American and Indian heritages of Latin America would further contribute to somewhat schizophrenic attitudes toward race among the elites of many nations. The old social pyramid, which placed whites on the top of the social scale and peoples with varying mixtures of Indian and Negro ancestry further down, would remain.²⁹⁵ Discrimination would persist in private employment, the civil service, and the officer corps of the armed forces. Negative stereotyping of black characters would be common in novels and films.²⁹⁶ Yet Indians and Afro-Americans would gain a place in many Latin American nations as folkloric symbols, tolerated,

292. See, e.g., WRIGHT, *supra* note 272, at 2-4.

293. See, e.g., Alexander S. Dawson, *From Models for the Nation to Model Citizens: Indigenismo and the 'Revindication' of the Mexican Indian, 1920-40*, 30 J. LATIN AM. STUD. 279, 279-84 (1998).

294. See FREYRE, *supra* note 61.

295. See Wright, *supra* note 271, at 327-30.

296. See RICHARD L. JACKSON, *THE BLACK IMAGE IN LATIN AMERICAN LITERATURE* 45-53 (1976).

even welcomed, as examples of an exotic element in their national culture.

What is probably even more important, from the point of view of modern race relations, is the new-found acceptance that the Afro-American and Indian cultures of Latin America contributed to the ideology of racial democracy. The exponents of racial democracy heralded the lack of discrimination in the nations of Latin America as well as the presumably open and tolerant attitudes toward the different races that lived in the various Latin American nations. The case for racial democracy was helped by the obvious mixing of races that had occurred in Latin America, the absence of a U.S.-style system of Jim Crow, and the fact that some individuals of obvious African or Indian ancestry were able to rise to the highest levels of government or the private sector in a number of Latin American societies.²⁹⁷ The Brazilian government, particularly after the Second World War, has been especially interested in promoting an international image of Brazil as a racial democracy.

The comparative story through the first half of the twentieth century was relatively straightforward. Slavery and racial prejudice had profound influences on race relations and racial stratification in all four American nations, but legal discrimination in the United States had created a pattern of systematic exclusion of Afro-Americans unparalleled elsewhere in the hemisphere. And yet in the second half of the twentieth century this history would take an ironic turn. The United States would, in many ways, undergo a more thorough civil rights revolution than would occur in Brazil, Colombia, Venezuela, or indeed any of the other nations of Latin America. To date, law in the United States, which had historically proven to be enormously effective, indeed critical, in erecting strong castelike barriers between blacks and whites, has also proven to be more effective in piercing racial barriers than has been the case with law in Latin America. The story of this turnabout is complex. This is partly a story of different legal structures and processes. Part of this story is about the role of unintended consequences in history—how ideas, institutions, and practices that were designed to achieve one set of goals sometimes end up furthering an entirely different set of aims. And this story is also part of the enduring, entangled history, the tension between racism and

297. It is interesting, for example, that even in Argentina, a nation that has taken great pride in its image as a white nation, that a mulatto Ramón Carillo served as minister of health under Juan Peron from 1946 to 1955. This was perhaps even more ironic given Peron's pro-fascist and pro-Nazi sympathies. See ROUT, *supra* note 87, at 366 n.58.

liberalism, present at the founding of the United States. This integral contradiction in the national culture and that often tortured history has played itself out in the second half of the twentieth century.

Here I intend to focus my comparison on two bodies of civil rights law. The first focus concerns measures intended to prevent or remedy employment discrimination. The second deals with measures intended to either prevent or remedy discrimination in admissions to universities, or to facilitate the admission of traditionally underrepresented groups, in this case Afro-Americans. There are several reasons for this choice. Like the United States, Brazil, Colombia, and Venezuela have constitutional guarantees against racial discrimination²⁹⁸ and have enacted an array of civil rights statutes designed to combat discrimination in a broad range of activities.²⁹⁹

Yet because of doctrinal and societal differences, civil rights measures are not always readily comparable cross-nationally. Brazilian

298. See, e.g., CONSTITUIÇÃO FEDERAL [C.F.] art. 3, § 4 (BRAZ.) (declaring that one of the fundamental purposes of the government is to promote the good of all without prejudice of origin, race, sex, color, ideology, or other forms of discrimination); *id.* art. 5, § 42 (recognizing racism as crime subject to criminal sanction under the law); CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 13 (guaranteeing equality before the law entitlement to equal rights, liberties, and opportunities without discrimination on basis of sex, race, or national origin); CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA art. 21(1) (prohibiting discrimination on basis of race, creed, sex).

299. For one volume that presents a collection of Brazilian civil rights statutes on the federal, state, and municipal level, see HÉDIO SILVA, JR., *ANTI-RACISMO: COLETÂNEA DE LEIS BRASILEIRAS: FEDERAIS, ESTADUAIS, MUNICIPAIS* (1998). Since the Second World War, civil rights and antidiscrimination statutes have been enacted by civilian and military governments in Brazil. Included in these are the following: Lei No. 1.390, de 3 de julho de 1951, D.O.U. de 10.7.1951 (criminalizing race or color based discrimination in public accommodations), Decreto Legislativo No. 23, de 21 de junho de 1967, D.O.U. de 23.6.1967 (approving of the International Convention on the Elimination of Racial Discrimination), Lei No. 7.437, de 20 de dezembro de 1985, D.O.U. de 23.12.1985 (criminalizing race or color-based discrimination in public accommodations as well as discrimination based on sex or marital status), Lei No. 7.716, de 5 de janeiro de 1989, D.O.U. de 6.1.1989 (criminalizing discrimination based on race or color in public accommodations and employment in private business), and Lei No. 8.081, de 21 de setembro de 1990, D.O.U. de 24.9.1990 (criminalizing the incitement of hatred based on race, religion, ethnicity, or national origin through the use of the media). An important question that needs to be examined with respect to Brazilian civil rights legislation is whether or not the emphasis on defining racism and racial discrimination as crimes may in fact have proven counterproductive. With an often inefficient criminal justice system and a severe problem of violent crime in many areas, see Alexandre Secco & Sérgio Ruiz Luz, *Somos Todos Refêns*, VEJA, Feb. 7, 2001, at 86, crimes involving racism or racial discrimination are likely to have a low priority. This raises the question of whether civil rights law would have been better served in Brazil with a strengthening of civil remedies through such mechanisms as multiple damages and the possibilities of contingency fees in discrimination cases.

law, for example, criminalizes racial insult.³⁰⁰ An attempt to do that in the United States would run up against severe First Amendment problems.³⁰¹ Similarly, while all four nations have statutes prohibiting racial discrimination in public accommodations and housing, the United States historically has had the most severe difficulty in this area. In contrast, the law in Brazil, Colombia, and Venezuela has tried to resolve Afro-American land claims stemming from the existence of large-scale maroon communities during slavery, an issue largely inapplicable to the United States.³⁰²

But the questions of employment and university admissions can be fruitful avenues for cross-cultural and cross-national comparisons. Both areas are critical to discussions of racial inequality and social mobility. For the last thirty years, policy and law in the United States have stood in marked contrast to policy and law in Latin America. Race-conscious remedies for discrimination have been recognized in U.S. law for more than a generation.³⁰³ Race-based affirmative action has survived for nearly an equal period, although its legal status has always been hotly contested³⁰⁴ and its future survival is appearing

300. In March 2001, a case involving racial insult was being heard in Brazil's Superior Tribunal of Justice involving a journalist who had written that *feijoada* (a dish made of pork and beans, particularly popular among Afro-Brazilians and Indians in Bahia and other northeastern states) was the food of subhuman races. See *STJ julga jornalista acusado de racismo por ter escrito que feijoada é "comida de sub-raças"*, Notícias do Superior Tribunal de Justiça, at http://www.stj.gov.br/stj/noticias/detalhes_noticias.asp?seq_noticia=3269 (Mar. 3, 2001).

301. For a legal scholar who argues that some kinds of racist speech should not be accorded First Amendment protection, see Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2356-61 (1989).

302. Throughout Latin America, large-scale maroon communities were able to come into existence and survive in part due to the small white populations in Brazil and the Spanish colonies. Geography also contributed to the long-term success of many maroon settlements in Latin America. Many of these settlements were in remote territories only nominally controlled by colonial or national governments. By way of contrast, in the United States, with its majority white population, even in the plantation South, maroon communities found it difficult to survive in the long run. John Blassingame wrote that maroon communities in the United States found long-term survival especially difficult in the nineteenth century, as improved roads and communications aided militia forces in overcoming such communities. See JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* 211-22 (2d rev. ed. 1979). He also noted that the most successful maroon communities were those that combined with, or merged into, Indian nations. The most famous example of which was the large Afro-American population in the Seminole nation.

303. One example of this might be found in the 1976 case, *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 762 (1976), in which the Supreme Court sanctioned the use of affirmative action in determining seniority in order to compensate the victims of employment discrimination.

304. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269-72 (1978).

increasingly precarious.³⁰⁵ Still the idea that race can be taken into account, that courts and administrative agencies can take notice of past discrimination or statistical disparities in race and employment or school admissions enjoys reasonably widespread support in contemporary U.S. jurisprudence and legislative efforts.³⁰⁶

Such a consensus is absent in modern Latin American law. Although the topic has been hotly debated, the Brazilian view has generally been to regard affirmative action as racial discrimination. Racial stratification and inequality in employment has been extensively documented in the social science literature.³⁰⁷ Social scientists concerned with workplace discrimination in Brazil have especially focused their attentions on São Paulo, Brazil's industrial heartland, particularly noting discrimination in white-collar jobs with extensive public contacts.³⁰⁸ Observers have also noted the paucity of blacks in the more prestigious echelons of Brazilian public service, the existence of discrimination in public accommodations, and the great disparities in wealth between whites and Afro-Brazilians.³⁰⁹ Still, Brazilian law has not developed racially conscious remedies for persisting inequality and discrimination, either of the affirmative action variety, or by allowing racial disparities in employment to serve as evidence of discrimination.³¹⁰

305. See, e.g., *Hopwood v. Texas*, 236 F.3d 256 (5th Cir.), *reh'g denied*, 248 F.3d 1141 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2550 (2001).

306. Even conservative jurists have, so far, agreed that race-conscious remedies might be used in cases where there has been a history of racial discrimination. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989).

307. See, e.g., GEORGE REID ANDREWS, *BLACKS AND WHITES IN SÃO PAULO, BRAZIL 1888-1988*, at 259-62 (1991); Edward E. Telles, *Industrialization and Racial Inequality in Employment: The Brazilian Example*, 59 AM. SOC. REV. 46 (1994).

308. See ANDREWS, *supra* note 307; Telles, *supra* note 307.

309. At one time the issue of discrimination in Brazilian life tended to be a taboo topic. There now seems to be a growing willingness to confront the issues of discrimination and inequality. The July 4, 2001, edition of *ISTOE*, a Brazilian news magazine, had a cover entitled *Você É RACISTA* [Are You Racist?], exploring issues of discrimination and inequality in Brazilian life. See Ana Carvalho & Aziz Filho, *Preconceito Oculto*, *ISTOE*, July 4, 2001, at 78-84.

310. I was informed by members of an Afro-Brazilian civil rights group I met at the United States Consulate in Rio de Janeiro that the state of Rio Grande do Sul has an affirmative action program. While I was not able to verify this, I have seen evidence that Brazil's southernmost state does have constitutional and statutory provisions designed to preserve Afro-Brazilian culture in the state (as well as the cultures of other ethnic groups). See SILVA, *supra* note 299, at 229-38. Whatever may be the case with respect to affirmative action on the state level, it still has not been adopted on the federal level. For a good overview of some of the issues involved in using statistical evidence in discrimination cases under U.S. law, see Joseph L. Gastwirth, *Issues Arising in the Use of Statistical Evidence in*

The field of university admissions also provides an important contrast between contemporary Brazilian policy and U.S. policy with regard to race and remedy over the past generation. Access to university education in Brazil is, in significant part, determined by a series of very rigorous secondary school/university entrance exams known as the *Vestibular*. The exams, similar to what might be found in a European Lycee or Gymnasium system, test the potential university applicant on, among other subjects, Portuguese language and literature, Brazilian history, a foreign language, and physical science, usually biology. Those who achieve the top scores in the exams are guaranteed admission with free tuition to the Federal Universities, the flagship schools of the Brazilian system of higher education. Because professional education, such as law, medicine, engineering, and business, are completed as part of an undergraduate education, success in the *Vestibular* can guarantee a student both a first-rate university education and entrance into the higher professions. Success in the *Vestibular* can be key to entry into Brazil's middle class.

And yet there is a tremendous irony in the structure of the system of university admissions in Brazil. Observers have noted that students who achieve high scores on the *Vestibular* are overwhelmingly from well-to-do families and attended private secondary schools.³¹¹ Poorer students who attended public schools have traditionally done poorly on the exams.³¹² Those who fail to achieve high scores on the *Vestibular* are sometimes eligible for admission to private and Pontifical universities, but students from low income families are usually unable to pay the tuition at these institutions.

The combined effects of poor primary and secondary education and the gatekeeping effects of the *Vestibular* have contributed to significant racial imbalances in Brazilian universities. Data collected by the program "*A Cor da Bahia* [The Color of Bahia],"³¹³ illustrates

Discrimination Cases, in *STATISTICAL SCIENCE IN THE COURTROOM* 227 (Joseph L. Gastwirth ed., 2000).

311. For a general look at Brazilian secondary education, see CARLOS A. HERRÁN & ALBERTO RODRÍGUEZ, INTER-AMERICAN DEVELOPMENT BANK, IDB Report No. BR-014: *SECONDARY EDUCATION IN BRAZIL: TIME TO MOVE FORWARD* (1999) [hereinafter *SECONDARY EDUCATION IN BRAZIL*].

312. It should be noted that only a minority of Brazilian students actually complete secondary school. Figures available for 1996 indicate that among eighteen year olds, 74.1% had completed the fourth grade, 43.9% had completed the eighth grade, and 8.9% had completed the eleventh grade. See *id.* at 1.

313. The program is sponsored by the Federal University of Bahia (UFBA) and is devoted to research on race and color, particularly Afro-Brazilian issues. The Web site address of the university is <http://www.ufba.br>.

how stark the imbalances can be. I examined their data on the racial composition of five Brazilian Universities (Federal University of Rio de Janeiro, Federal University of Paraná, Federal University of Maranhão, Federal University of Bahia, and the University of Brasília). For each university I performed a binomial distribution test, testing the expected result (if the universities had matched the racial composition of their states) against the observed result (actual racial composition of the university). In each case, there were significantly more white students than would have been expected if the universities had matched the racial composition of the states, coupled with an exceedingly low probability that these results occurred by chance.³¹⁴ The underrepresentation of Afro-Brazilian students at the Federal Universities is not the result of current racial discrimination. It is, however, the result of a university admissions process that gives a tremendous advantage to the children of the well-to-do, who are able to afford good secondary educations and are thus able to do well on the *Vestibular* and gain admission to the high quality, tuition-free federal universities. This has a negative impact on Afro-Brazilians who are disproportionately represented among the poor in Brazil. Even a class-based affirmative action program that guaranteed a certain percentage of seats in federal universities to disadvantaged students with promising test scores might go a long way toward providing a path of upward mobility for poor and working class students, as well as providing greater inclusion for Afro-Brazilians.

The relative lack of inclusion of Afro-Brazilians in higher education has been mirrored by largely ineffective efforts to address the problem of employment discrimination through the law.

314. Federal University of Bahia: Total enrollment 3288; Actual white enrollment § 1670; expected white enrollment § 664 $p < .0005$. Federal University of Rio de Janeiro: Total enrollment § 4056; actual white enrollment § 3115; expected white enrollment § 2223; $p < .0005$. Federal University of Paraná: Total enrollment § 3499; actual white enrollment § 3027; expected white enrollment § 2652; $p < .0005$. Federal University of Maranhão: Total enrollment 907; actual white enrollment § 426; expected white enrollment § 187; $p < .0005$. University of Brasília: total enrollment § 3288; expected white enrollment § 1542; actual white enrollment § 2094; $p < .0005$. The data was reported by the *A Cor da Bahia* program at the Federal University of Bahia. See *A Cor da Bahia*, Faculdade de Filosofia e Ciências Humanas-Pesquisas, Universal Federal da Bahia, at <http://www.ufba.br/~acordaba/tabelas2.html> (last visited Sept. 2, 2001). The state populations were taken from the 1991 federal census. Enrollments reflect 1997 enrollments. The Brazilian census included *Pardos* (mulattos) and *Pretas* (blacks) as *Negras* (which can be translated as Negro or black, but which I am calling Afro-Brazilian to avoid confusion with the Preta category). Calculations were done with Statistical Package for the Social Sciences Release 9. For a discussion of binomial distribution, see ALAN BRYMAN & DUNCAN CRAMER, QUANTITATIVE DATA ANALYSIS FOR SOCIAL SCIENTISTS 118-19 (1990).

Employment discrimination in Brazil is addressed through general civil rights or antidiscrimination legislation. Brazil has a tradition of ineffective civil rights law that now dates back half a century. Modern Brazilian antidiscrimination legislation began with the passage in 1951 of the civil rights statute *Lei Afonso Arinos*.³¹⁵ The statute criminalized racial discrimination in employment, commerce, public accommodations, public office, and education.³¹⁶ These were declared crimes punishable by either jail sentence or fines.³¹⁷ The statute began what has become a pattern in Brazilian civil rights legislation. Racial discrimination and racism are offenses under the criminal law.³¹⁸ Antidiscrimination legislation has traditionally been ineffective because of enforcement problems. Most observers agree that *Lei Afonso Arinos* was largely unenforced. The statute was revised in 1985 to also prohibit discrimination based on sex and marital status.³¹⁹ Following in the spirit of earlier civil rights legislation, the 1988 Constitution stated that racism was a criminal offense, punishable by imprisonment, and for which bail was not possible.³²⁰ The 1988 Constitution was quickly followed by the passage of additional civil rights legislation.³²¹ One year after the enactment of the 1988 Constitution, Congress passed *Lei 7716* declaring that acts resulting from racial or color prejudice were punishable crimes.³²² The statute known as *Lei Caó* was lengthy and many critics charged that it was too vague and had too many loopholes.³²³ It would be revised with the *Lei Paim* in 1997, which specified that any crimes based on race, ethnicity, religion, color, or national origin could be punishable by one to three years imprisonment as well as with a heavy fine.³²⁴ The revised

315. Lei No. 1.390, de 3 de julho de 1951, D.O.U. de 10.7.1951.

316. *Id.*

317. *Id.*

318. See SILVA, *supra* note 299.

319. Lei No. 7.437, de 20 de dezembro de 1985, D.O.U. de 23.12.1985.

320. C.F. art. 5, § 42.

321. See Lei No. 7.716, de 5 de Janeiro de 1989 (criminalizing discrimination based on race or color in public accommodations and in employment in the private sector); Lei No. 8.081, de 21 de Setembro de 1990, D.O.U. de 24.9.1990 (criminalizing the incitement of hatred based on race, religion, ethnicity, or national origin through the use of the media).

322. Lei No. 7.716 de 5 de Janeiro de 1989, D.O.U. de 6.1.89.

323. For a discussion of the difficulties found in actual enforcement of Brazilian antidiscrimination law, including *Lei Caó*, see Cláudia Margarida Ribas Marinho, *O Racismo no Brasil: Uma Análise do Desenvolvimento Histórico do Tema e da Eficácia da Lei Como Instrumento de Combate à Discriminação Racial* 40-41 (1997), available at <http://infojur.ccj.ufsc.br> (unpublished undergraduate thesis in law, Federal University of Santa Catarina) (on file with author).

324. Lei No. 9.459, de 13 de maio de 1997, D.O.U. de 14.5.1997.

legislation does not appear to have led to a significant increase in prosecutions for bias crimes. Dedicated police units were established in São Paulo in 1993 and Rio de Janeiro in 1994 to help investigate bias crimes and enforce civil rights legislation, but indications are that these units have not been particularly effective.³²⁵

Despite the often stern language of Brazilian antidiscrimination statutes, indications are that these measures have had a rather minimal effect. Studies have shown that only a small percentage of discrimination complaints get to the higher courts. Complaints are often dismissed by police officials. One thesis by a Brazilian law student has suggested that antidiscrimination legislation has been ineffective because the legal system has tended to treat instances of racism and discrimination as isolated and not as part of larger societal patterns.³²⁶ Many lawyers and civil rights advocates have complained about the ambiguities of the laws and the refusal of the higher courts to try such cases.

In his examination of Brazilian antidiscrimination law, legal scholar Joaquim B. Barbosa Gomes has criticized the Ministério Público Federal's lack of effective enforcement.³²⁷ He attributes the Ministry's ineffectiveness to lack of organization, fiscal chaos, and even internal ideological battles.³²⁸ In light of the perceived ineffectiveness of Brazilian antidiscrimination law, many nongovernmental organizations (NGOs) have dedicated their efforts to improving civil rights legislation. A conference in Brasília, organized by lawyer Sérgio Martins of the *Escritório Nacional Zumbi* in March 2000, was aimed at developing mechanisms to combat racism and discrimination.³²⁹ Other NGOs in Brazil, such as O CEAP—Centro de Articulação de Populações Marginalizadas, have served as advocacy groups for reforming antidiscrimination legislation.³³⁰

325. See *Inter-American Commission on Human Rights: Organization of American States, Report on the Situation of Human Rights in Brazil: Ch.9 Racial Discrimination*, at <http://www.cidh.oas.org/countryrep/brazil-eng/Chaper%209%20htm> (last visited Nov. 1, 2001).

326. See Ribas Marinho, *supra* note 323.

327. See Joaquim B. Barbosa Gomes, *Discriminação Racial: Um Grande Desafio Para o Direito Brasileiro*, available at <http://www.alternex.com.br/~ceap/juridico.html> (last visited Nov. 1, 2001).

328. *Id.*

329. See Romário Schettino, *Advogados Procuram Meios de Combate ao Racismo*, *Orden dos Advogados do Brasil*, at <http://www.oab-go.com.br/oabgo/nt%5Fjuridicas/23032000.htm> (last visited Nov. 1, 2000).

330. See Barbosa Gomes, *supra* note 327.

There is an ironic aspect to the last half century of relatively ineffective antidiscrimination legislation in Brazil. Brazilian statutes outlawing discriminatory practices have sought to buttress their prohibitions with the sanction of criminal law—presumably an indication that racism engenders the highest moral outrage of the Brazilian people and polity.³³¹ Yet the criminalization of racial discrimination may have actually hindered the development of a body of robust civil rights law. Simply put, courts are less willing to impose criminal, as opposed to civil, penalties for racial discrimination. The burden of proof will be higher than in a civil case. Also, given the often high rates of property crimes and violence, allegations of racial discrimination are likely to be regarded as lesser priorities for an overtaxed criminal justice system.³³² What is remarkable, and has doubtlessly retarded the development of effective antidiscrimination legislation, has been the failure of the Brazilian legal system to develop strong incentives for private civil suits for victims of alleged discrimination in employment and other areas.³³³

The differences between the Brazilian and U.S. approaches to remedying inequality and discrimination in education and employment often provide sharp contrasts, particularly if one focuses on law and policy since the 1970s. There is a seductively simple, but not totally accurate, narrative that can be used to explain this contrast. The United States, burdened by its history of legally-sanctioned racial discrimination, has, over the last thirty years, embarked on a program of both race-based remedy and relatively effective antidiscrimination law. Brazil, lacking such a history, has historically rejected this course. But that is only part of the story. The other part of the story has to do with the broader themes of national culture and national history. The Brazilian examples with respect to higher education and employment

331. See *supra* note 320 and accompanying text (showing that the 1988 Constitution proclaimed racism to be a crime for which bail would not be available).

332. See Secco & Ruiz Luz, *supra* note 299.

333. This spring, I collaborated with Tanya Hernandez on a consulting project for the IDB. The project's purpose was to explore ways of strengthening legal remedies for racial discrimination against Afro-Americans in Latin America. One of our conclusions was that antidiscrimination law in Latin America would be strengthened by the adoption of certain concepts that are commonplace in contemporary U.S. civil litigation. Borrowing largely from tort and employment discrimination law, we suggested that such features as contingency fees, multiple and punitive damages, and permitting statistical inferences of discrimination would go a long way toward encouraging the development of a vigorous private civil rights bar as well as providing relief to victims of discrimination. See Robert J. Cottrol & Tanya K. Hernandez, *The Role of Law and Legal Institutions in Combating Social Exclusion in Latin American Countries: Afro-American Populations* (n.d.) (unpublished manuscript, on file with author). This recommendation should not be regarded as the official view of the IDB.

discrimination reflect not just a greater current tolerance for racial stratification, but the historically greater tolerance for inequality and hierarchy generally found within the Brazilian national culture. By the 1990s, racially based affirmative action legislation and efforts to strengthen existing antidiscrimination legislation were beginning to be proposed and debated in the Brazilian Congress.³³⁴ The constitutionality of affirmative action measures in particular were debated by legal and social commentators.³³⁵ The move to reexamine racial inequality in the 1990s was spurred on by stronger activism among Afro-Brazilians and by the election of President Fernando Henrique Cardoso, who has made addressing issues of racial inequality a governmental priority.³³⁶ Still, affirmative action, more effective antidiscrimination, and other racial remedies are beginning to be debated within the context of a society with strong traditions of hierarchy, deference, and limited social mobility. Whether a society that has had a weak tradition of providing vehicles for social mobility in general will be able to develop and sustain robust mechanisms designed to overcome both racial prejudice and class disability remains to be seen.

Colombia and Venezuela are also societies where traditional patterns of inequality and hierarchy have hampered the development of a robust body of antidiscrimination law and efforts to remedy structural inequalities. Despite constitutional and statutory recognition of the antidiscrimination principle, available evidence indicates that the legal prohibitions have done little to prevent employment discrimination in either nation.³³⁷ Contemporary Colombia is of particular interest to those concerned with the effect of law on racial inequalities and Afro-American populations. Its current constitution, adopted in 1991, has perhaps Latin America's most robust language in terms of

334. Joaze Bernardino, *Ação Afirmativa No Brasil: A Construção de Uma Identidade Negra?* 10-16 (1999) (dissertação apresentada ao Departamento de Sociologia da Universidade de Brasília como parte dos requisitos para a obtenção do título de Mestre em sociologia) (unpublished Master thesis in sociology, University of Brasília) (on file with author). I would like to express my appreciation to Ms. Bernardino for sharing a copy with me.

335. *Id.*

336. Cardoso has also identified personally with Afro-Brazilians. During his campaign for the Presidency, Cardoso declared that he was "a bit mulatto," and had "one foot in the kitchen," a reference to the frequent employment of Afro-Brazilians in domestic service. See Isabel Braga, *FHC Volta a Afirmar que Não é Branco Puro*, O ESTADO DE SÃO PAULO, at <http://www.estado.com.br/editorias/2000/12/14/pol403.html> (Dec. 14, 2000).

337. See Sanchez & Franklin, *supra* note 67, at 109-15. For a comprehensive examination of Afro-Colombian social conditions, see WADE, *supra* note 67. For a discussion of race and Afro-Venezuelan social conditions, see WRIGHT, *supra* note 272.

addressing the issue of racial inequality.³³⁸ Colombia has what is in effect a two-tiered legal approach to the issue of inequality and the Afro-Colombian population. The first part of that approach involves the proclamation of antidiscrimination as a constitutional principle.³³⁹ This is similar to the statutory and legislative approaches we have previously examined with respect to Brazil, and it appears to have some of the same weaknesses in terms of the strength of enforcement and the facilitation of private legal action.³⁴⁰ The second tier of the Colombian approach, also part of their 1991 Constitution, involves addressing the needs of distinct Afro-Colombian communities, treating them in many ways similar to the treatment of indigenous communities.³⁴¹ The existence of large-scale *Cimarrón* communities during slavery helped create culturally distinct Afro-Colombian communities, particularly on the Pacific Coast. Those communities and an anglophonic Afro-Colombian community on the island of San Andreas have helped bring about the adoption of constitutional provisions designed to protect the traditional landholdings of distinct Afro-Colombian communities. This was of particular importance because these communities often lacked formal land title, even though the communities had held and worked the land for generations, indeed centuries. The 1991 Constitution also seeks to provide a certain minimum of representation for Afro-Colombians in the national Congress based in part on representation of culturally distinct Afro-Colombian communities.³⁴² The Colombian Constitution has actually been, at least as a formal matter, quite far-reaching when addressing the needs of distinctive Afro-Colombian communities. This stands in contrast to the relative inability of the Colombian legal system to enforce effectively the Constitution's antidiscrimination provisions.

The Colombian legal system has proven to be more adept at redressing the problems of those Afro-Colombians who form distinct cultural communities than those part of mainstream Colombian society who seek relief from discrimination and inequality. Certainly the history of slavery and race relations in that nation have played a large part in creating that legal anomaly. The phenomenon of large-scale *Cimarrón* communities during slavery, coupled with the relative isolation of Pacific Coast Afro-Colombian communities, have created

338. See CONSTITUCIÓN POLITICA DE COLOMBIA art. 13.

339. *Id.*

340. See *supra* note 299 and accompanying text.

341. CONSTITUCIÓN DE COLOMBIA trans. art. 55.

342. See *id.* art. 176.

culturally distinct Afro-Colombian enclaves that could be addressed by specific legal and, in this case, constitutional provisions.

Venezuela presents an interesting contrast with Colombia in this regard. If history has helped bring about a Colombian Constitution that provides both official recognition and an attempt to address the concerns of distinctive Afro-Colombian communities, Venezuelan history and culture seems to have produced the opposite policy. Adhering to a firm notion of *mestisaje*, the notion that racial mixture has blended and made the races that comprise the Venezuelan nation indistinguishable, the Venezuelan government does not keep official data on race, refusing to even include racial categories in the national census.³⁴³ Although there are clearly people who are regarded as black, mulatto, white, and Indian, there is supposed to be no official recognition of such.³⁴⁴ This lack of official recognition of race greatly complicates the business of trying to get firm data on racial inequality and possible causes, whether those causes could be seen as structural or as a result of intentional discrimination. There is certainly strong anecdotal evidence of considerable discrimination, particularly employment discrimination, but the kind of quantitative evidence of such, which has played an important role in the development of both civil rights legislation and litigation efforts in the United States, is simply absent in the Venezuelan context. Venezuela, in this regard, also stands out in marked contrast to both Brazil and Colombia. Both of the latter nations provide racial data in their censuses that have been used, at least as arguing points, for framing measures to combat racial inequality.³⁴⁵

343. The Venezuelan national ethos that race should be considered irrelevant and not mentioned is captured in the saying of Venezuelan poet Rafael Castro: *soy indio, soy negro, soy blanco, soy americano* [I'm Indian; I'm black; I'm white; I'm American]. WRIGHT, *supra* note 272, at 8.

344. There are even distinct regions in which Afro-Venezuelan peoples and cultural practices predominated. This is especially true in a zone east of Caracas known as Barlovento. For a discussion of Afro-Venezuelan folkloric practices in that region, see David M. Guss, *The Selling of San Juan: The Performance of History in an Afro-Venezuelan Community*, in 1 BLACKNESS IN LATIN AMERICA AND THE CARIBBEAN, *supra* note 124, at 244-77.

345. In the fall of 2000, the Colombian government expressed its view that noting racial data in the national census was critical to the effort to attack racial inequality in that nation:

In effect, the information that can be captured in the censuses, is of supreme importance at this time to the analysis of matters of special relevance, such as how to analyze the causes of racism, the current realities of what was derived from slavery, . . . the methods of preventing and compensating for racial discrimination, particularly in inter cultural education, affirmative action and in general the

VI. CONCLUSION

And it is that effort to combat racial inequality that links our four American nations, with both each other and with their common, yet disparate pasts. Slavery and slave law had much to do with the creation of racial hierarchies and racial identities in the Americas. Legal categories and legal boundaries first established in slavery would, over time, become transformed into social and cultural facts, shaping the way the peoples of the Americas thought about racial categories and racial stratification. This process would continue long after emancipation. For those concerned with the role of law in creating and hopefully ultimately ameliorating racial divisions and racial inequalities in U.S. society, there is much to be learned by viewing our familiar North American odyssey with race and law, not in isolation or as a unique event, but instead as part of a larger hemispheric history. The legal issues that we have wrestled with, both now and in the past, are brought into sharper focus when viewed through a comparative lens. Our comparative focus tells us in part how slavery left a common legacy of racial stratification and subordination to different nations of the hemisphere. It can also highlight the often unique nature of race relations in the U.S. and especially how the anomalous amalgam of profound liberalism and profound racism has shaped both U.S. law and culture. That understanding is critical to an understanding of the unfinished journey of the Afro-American peoples of the Western Hemisphere. Begun before the twentieth century, it continues into the twenty-first. It is the journey from emancipation to equality.

mechanism oriented toward the search for equality of opportunity for populations that are victims of racism.

See *Republica de Colombia: Ministerio de Relaciones Exteriores, Direccion General de Asuntos Especiales, La Captacio de la Diversidad Cultural en los Proyectos Censales y Su Importancia en la Lucha Contra el Racismo, La Discriminacion Racial, La Xenofobia y Demas Formas Conexas de Intolerancia*, in *TODOs CONTAMOS*, *supra* note 117, at 2-3.